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THE POLITICAL PARTIES AND LEGAL AID

THERE can be little doubt that the debate on the reform of the law of legal aid to the poor has made substantial progress since the Report of the Reconstruction Sub-Committee of the Haldane Society[1] set the ball rolling. The interest of the legal world in this debate has been very considerable, as is witnessed by the number of articles in both learned and popular periodicals, including a very lively correspondence in "The Times."[2] A Committee under the chairmanship of Lord Rushcliffe has been appointed to consider the problem and devise means for an improvement of the existing

[1] Haldane Society, "The Law and Reconstruction," being the First Report of the Legal Reconstruction Sub-Committee of the Haldane Society, containing recommendations as to Law Reform, capable of being carried into effect during the War (1942) pp. 2 ff.

[2] The following is a short list of publications in English Legal periodicals, published since 1941: Hassard-Shortt, "Legal Aid for the Poor," in 23 *Journal of Comparative Legislation* (1941) pp. 27 ff; Keeton, "The Problem of Law Reform after the War," in 58 *Law Quarterly Review* (1942), pp. 147 ff.; Bradway, "Legal Aid Work in the U.S.A.," in 24 *Journal of Comparative Legislation* (1942), pp. 39 ff.; E. J. Cohn, "Legal Aid for the Poor; a study in Comparative Law and Legal Reform," in 59 *Law Quarterly Review* (1943), pp. 250 ff., and 359 ff.; E. J. Cohn, "Legal Aid for the Poor," in *The Fortnightly* (1944), No. 929, N.S., pp. 315 ff.; Schmitthoff and Terry, "Legal Aid and Social Security," in 7 Mod. L. Rev. (1944), pp. 138 ff.; Hayman, "Legal Aid for the Poor in South Africa," in 26 *Journal of Comparative Legislation* (1944), pp. 12 ff.; E. J. Cohn, "Two Systems of Legal Aid to Poor Persons," in 60 *Law Quarterly Review* (1944), pp. 24 ff.; Egerton, "Historical Aspects of Legal Aid," in 60 *Law Quarterly Review* (1944), pp. 24 ff.; Anonymous, "Reforms in the Administration of Justice," in 89 *Solicitors' Journal* (1945), p. 124. See also Loewensohn, "The Poor Man's Right to Legal Aid," in *The Scottish Law Review*, and Sheriff Court Reports, April, 1945. It would be difficult to find another subject which has attracted a similar amount of attention in late years.

machinery. Now even the political parties, whose interest in the matter was somewhat sceptically assessed by at least one writer,[3] have begun to take due notice of the problem and to consider schemes for its solution.

This is in effect a major success. When, around 1925, there was a similar movement for the reform of this much-neglected part of the law, the political parties remained passive. Mr. Gurney-Champion's book on *Justice and the Poor in England*[4] contains an appendix which consists of a reprint of various questions and answers in the House of Commons. But these questions, and more so the fact that many of them received only a very curt reply, show that there was no clear vision of what would have to be done and little determination to do anything at all. No wonder that the reform that ensued achieved very little and that such improvements as did ensue were due more to the efficient administration of the law by the London Law Society than to the comparatively minor changes that the then Lord Chancellor's Committee recommended. This time, however, the two great parties have realised that legal aid to the poor is a problem of major importance for large sections of the community.

The Conservative Party appointed a Sub-Committee on Reforms in the Administration of Justice under the chairmanship of Mr. C. R. Havers, K.C., to consider *inter alia* the following two questions:

> 1. Is there any method by which the expense of litigation can be tempered to the litigant whose income is above the Poor Persons' level?
>
> 2. Whether there has been any complaint as to the expense of legal advice and procedure in non-litigious matters, and if so whether there are grounds for such complaint?

The Report of the Committee has been published as one of the series of Conservative Post-war Problems Report.[5] It is a document of some length—comparable to a Departmental Committee Report.

The Labour Party gave evidence before the Rushcliffe Committee and for this purpose a memorandum was prepared by a number of lawyers under the chairmanship of Mr. J. P. Eddy, K.C. This memorandum is reprinted in the Supplementary Report and Special Final Agenda for the 43rd Annual Conference.[6] It is much shorter than the Conservative Report and evidently relies largely upon the preparatory work of the Haldane Society for support of the theses which it has adopted.

At the time when these lines are being written the Report of the Lord Chancellor's Committee has not yet been published. It is not certain whether it will adopt any of the suggestions which have been made by either party. While the conclusions of Lord Rushcliffe and

[3] E. J. Cohn, "Legal Aid for the Poor," in 59 *Law Quarterly Review*, p. 252.

[4] Gurney-Champion, *Justice and the Poor in England* (1926), pp. 231 ff.

[5] "Looking Ahead"—*Administration of Justice*. Being a Report of the Conservative Sub-Committee on Reforms in the Administration of Justice (1945). —Questions 1 and 2 deal with problems of legal aid. This Report is in the following notes referred to as C.

[6] Pp. 18 ff. This Report is in the following notes referred to as L.

his committee are still unknown it is perhaps not without interest to notice that the two great Parties which with the assistance of eminent lawyers have considered the problem have on a number of aspects arrived at identical conclusions. Such identity of views cannot be without influence upon future legislation. On the other hand, there is still a considerable amount of divergence of opinions. It is of some importance to consider the respective arguments and the ideological background which is responsible for them.

I

Of the two aspects of our problem, legal aid in litigation and legal advice, the former is obviously far more important. It is fortunate that on this aspect a substantial measure of agreement appears to exist.

1. In the first instance both Parties agree that legal aid should not be restricted to the High Court. As I have attempted to show on another occasion English and American law are now the only two legal systems which restrict the operation of a legal aid scheme to the higher courts.[7] The Conservative Report says:[8]

> We are satisfied by the evidence submitted to us that an overwhelming case has been made out to-day for the necessity of providing aid in the conduct of legal proceedings in the County Court to persons of modest means.

The Labour Party Report states:[9]

> The Labour Party sees no justification for depriving litigants in the County Court of the benefits of the Poor Persons proceedings.

The Labour Party Report contains, however, one rather strange restriction: legal aid is not to apply in case of remitted actions. Unfortunately no reasons are given for this restriction. The present writer has on another occasion suggested that Sect. 46 of the County Court Act, 1934, should be entirely abolished.[10] Under this section in an action in tort begun in the High Court the Court or judge has power to transfer the proceedings to the County Court if the defendant by an affidavit made by himself or by any person on his behalf, shows that the plaintiff has no visible means of paying the costs of the defendant should a verdict be found against the plaintiff. The section constitutes a discrimination against poor plaintiffs which it is hard to justify. It is surprising to see that the Labour Party Report suggests that the discrimination in such cases should not only continue to exist, but even be made worse; for, needless to say, a plaintiff who has been granted legal aid in the High Court would be greatly prejudiced if the transfer to the County Court would also result in his losing such legal

[7] E. J. Cohn, 59 *Law Quarterly Review*, p. 269.
[8] C. p. 13 No. 23.
[9] L. p. 19.
[10] E. J. Cohn, Section 46 of the County Courts Act, 1934, in 60 *Law Quarterly Review* (1944), pp. 24 ff.

assistance as was granted to him in the High Court. Furthermore, a defendant who is in a similar position would hardly dare to apply for remission to the County Court if the success of his application would result in the loss of the grant of legal aid. In the case of Sect. 46, County Court Act, at least, the suggestion of the Labour Report seems, therefore, out of place.

The Conservative Party Report suggests that rules should be made in the County Court, to enable persons to receive assistance in County Court cases under terms and conditions similar to those recommended for the High Court. The Labour Party Report provides a different machinery for the grant of legal aid in the County Court from that which is suggested for adoption in the case of the High Court. We shall have to deal with this problem in another connection. Meanwhile it may be said that there are certainly strong arguments against having one system of legal aid in one set of courts and a different system in another set of courts. Simplification of rules is not only of advantage to the hard-pressed law student and legal practitioner. It is also of value to the would-be litigant himself if there is one and the same rule for all manner of courts. It would be even better if there were only one authority granting legal aid in any court of whatever character. It is no exaggeration to say that the majority of persons who intend taking proceedings do not know to which court they would have to apply. A variety of authorities, each of which has jurisdiction to grant legal aid on a limited field only and each of which has to send the unfortunate applicant to another door if the case is outside its jurisdiction, would entail unnecessary duplication of work and be a source of confusion.

Neither draft mentions legal aid in the courts of summary jurisdiction. There is perhaps some doubt whether and to what extent legal aid in these courts is required or desirable. There is no unanimity on the point among legal writers.[11] It is not certain that the silence of the two political parties means that the point has been considered by them and that they find that no legal aid is required in these courts. In at least some of the non-criminal cases which are within the jurisdiction of the courts of summary jurisdiction legal aid to the litigants seems to be highly desirable.

Neither report mentions legal aid before the administrative tribunals whose number and importance is still growing strongly and has every prospect of continuity to grow further in the future. It is to the credit of the Haldane Society to have drawn attention to the need for legal representation before these courts. In some of the existing tribunals some form of legal aid would be most urgently required. It is only necessary to refer to tribunals like the District Advisory Committees operating under the Disabled Persons (Employment) Act, 1944, or the Conscientious Objectors Tribunals or the

[11] See Egerton, l.c. p. 94; E. J. Cohn, in *The Fortnightly* (1944), p. 315; Gurney-Champion, l.c. p. 38.; Mervyn Jones, *Free Legal Advice in England and Wales* (1940, Oxford, Slatter & Rose), p. 56.

Military Service (Hardship) Committees. On the other hand, it must be admitted that the procedure of each of these tribunals is so different from that of the others that it is difficult to conceive of any rules by which appropriate legal assistance could be guaranteed in every one of them beforehand, especially at a time like the present, when new forms of administrative tribunals are created every year—often only to make room for different kinds of tribunals after a comparatively short period. The best that can be expected is that the legislature when setting up such tribunals should at the same time provide some facility for legal aid. If a strong organisation of legal aid would exist in the ordinary courts, the problem would not be so easily overlooked by the legislature.

2. The term "legal aid for the poor" or "Poor Persons" seems to be equally displeasing to both parties. As the Labour Party Report rightly says, there is a "danger that a 'Poor Law' atmosphere may come to surround the system of Free Legal Aid." Assistance to needy persons is not a matter of grace. Both reports, although neither of them explicitly states the principle, are based on the assumption that legal aid in litigation is not a charity. It is an indispensable part of the administration of justice which the modern state, which recognises the Rule of Law, provides for those of its citizens who need it. Due regard is to be paid to this in the matter of terminology. The question is not without practical importance. Many thoroughly deserving applicants feel hurt by being styled "poor persons" and thus being degraded to what they consider the level of a beggar or a poor-house inmate. The Conservative Report[12] suggests the term "assisted person." The Labour Party Report[13] recommends "person qualified to receive legal aid." The difference is of no importance. But the suggestion that the present terminology should be replaced by one that is less humiliating to the unfortunate applicant should not be overlooked by the legislator.

3. The present law, under which persons who earn more than £2 per week or "are worth more than £50" are—apart from special circumstances—not entitled to legal aid, is disapproved by both parties. The Labour Party Report says that there is no justification for the retention of these limits.[14] The Conservative Party Report says that the present state of the law has prevented a substantial number of persons from pursuing or defending their legal rights in the Court.[15] Agreement is thus reached on the need for reform. Unfortunately it does not extend to the character of the reform that is required.

The Labour Party Report suggests that all financial limits be abolished and that it should be left to the certifying authority to say whether in the individual case the individual applicant should be

[12] C. p. 12, No. 20.
[13] L. p. 20.
[14] L. p. 18.
[15] C. p. 9, No. 9.

admitted having regard to all the circumstances, especially his income, his means and the approximate costs of the proceedings. All the applicant's household furniture is to be excluded from consideration of the means at the applicant's disposal. The Conservative Party Report rejects this solution on the ground that it would result in an absence of uniformity throughout the country, as, of course, the different certifying authorities would adopt different standards.[16] It advocates a modified semi-rigid system. The property limit is to be dropped and an income limit is to be introduced which is itself of a flexible character, i.e. open to revision. Rigidity is further decreased by providing a higher limit for a married man than for a bachelor or a woman without dependants and by allowing further increases in the case of children, or other dependants. On this basis the Conservative Party Report suggests that at present the limit should be £4 for a bachelor, and £5 for a married man plus 10s. for each additional child, with a maximum of £7.

It is to be hoped that the present writer who has earlier, like other writers,[17] recommended the flexible system, now advocated by the Labour Party, will not be suspected of bias in favour of his solution, if he believes that the actual suggestion adopted by the Conservative Party Report itself shows that any system other than the flexible system results by necessity in the most shocking forms of injustice. Why should a married man with 5 children, or with 3 children and 2 dependent parents, not obtain the status of a poor person if he earns £7 2s. 0d., while another who supports only 4 children and earns £6 19s. 0d., can obtain it? It is no use saying that these are two extreme examples: it is clear that such cases will happen and where this is so it is no consolation for the parties to tell them that the case is an especially harsh one, while the "normal" cases receive just treatment. The Conservative Committee has, of course, seen the possibility or even probability of harsh cases: their reply will probably be that the inequality in treatment which the flexible method entails is a greater disadvantage than the harsh cases of the rigid method. It may well be doubted whether this is true: the rigid method makes the harsh cases much easily discernible. It may well be said that it is better to select a system whose application *may* result in inequality of treatment rather than one which *must* produce clear cases of injustice.

The rigid method, even in this modified form, is based on too primitive an assessment of man's needs and requirements. To be able to judge what sacrifices a man can be expected to bring for the purpose of taking an action into court, one must know more about him than just what his income is and how many dependants he has. A man with

[16] C. p. 10, No. 12.

[17] See E. J. Cohn, 59 *Law Quarterly Review* (1943), pp. 352 ff.; Maguire, "Poverty and Civil Litigation," in 36 *Harvard Law Review* (1923), pp. 361 ff.; Jacoby, "Legal Aid to the Poor," in 53 *Harvard Law Review* (1940), pp. 952 ff.; Haldane Society, l.c.; the Report submitted in 1937, to the Secretary of State for Scotland by an official Committee adopted the same view. *See Cmd.* 5435, p. 19. Some telling examples of the working of the rigid system are given by Gurney-Champion, l.c. p. 84 ff.

a sick wife who is in constant need of treatment, needs more money than a man whose wife is healthy. A man of 20 years of age can do with less than a man of 65. A man whose wife expects a child is financially worse off than a man whose wife has never had children and is not expected to have them in the future. A man who is burdened by debts is in a very different position from a man who has none. In short the varieties of life are so manifold that it is a hopeless undertaking to cover them within the limits of one or two rigid or semi-rigid rules. Such rules must result in substantial injustice.

As against such injustice the argument derived from the expected inequality of treatment loses a great deal of weight where, as in the Conservative Party Report, such inequality of treatment has by no means been eliminated. For the Conservative Party Report suggests that the applicant may be required to contribute to the costs of the proceedings in accordance with his or her means.[18] As according to the Conservative suggestion the property of the applicant is not taken into consideration for the purpose of deciding whether or not a certificate is to be granted, it was necessary to make some provision for the case of persons of means but with a small income. These persons can according to the Conservative Party Report be granted the status of a poor person, but have to make a contribution to the costs. One may perhaps doubt whether the legislative technique, applied here, is very commendable: in the view of the present writer a young man with a considerable sum to his credit at a bank, but without any income, should not be granted the status of an assisted person at all. It seems a roundabout solution that he should be required to contribute to the costs of the proceedings or even pay the whole of them. This, however, is beside the point which we are now considering. The point is that the amount to be contributed and the requirements for its contribution are in the Conservative Party Report left entirely to the free discretion of the certifying authority. Consequently the objection derived from the absence of uniformity holds good against the Conservative suggestion nearly to the same extent as against the Labour Party scheme. No comprehensive scheme of legal aid for the poor can do without a far-reaching measure of free discretion on the part of the certifying authority. Any scheme that tries to cope with it without permitting such free discretion is not comprehensive. Any scheme that tries to be comprehensive, as is the case with the Conservative Party's scheme, must grant a certain amount of free discretion to the certifying authority. The Report of the Haldane Society had spoken of the present system of granting legal aid to the Poor as of a "hit or miss system," because under the present scheme the applicant can either obtain the full status of a poor person or no support at all. The argument was rightly found to be convincing by the Conservative Committee. The consequence is the introduction of the system of requiring a contribution to the costs of the proceedings from the applicant. There are many parallels for this course in foreign

[18] C. p. 9, No. 13.

legal systems. Such a course could, however, not be adopted without leaving a very considerable amount of free discretion to the certifying authority.

All that the Conservative Report has done is, therefore, that it has provided limits for the exercise of free discretion. It is pertinent to consider what these limits may mean in the individual case. According to the Conservative scheme a bachelor with £250 to his credit at the bank, but without income, can be granted the status of a poor person, although he may be required to contribute to the costs of the proceedings. On the other hand, another bachelor who now earns £4 10s. 0d., cannot be granted the status of a poor person, even though during several years of unemployment he has incurred considerable debts to his butcher and his baker. The mischief of the rigid limits remains, while such mischief as free discretion can work is not eliminated.

It is submitted that the system of fixed limits as such is indefensible. It should be abolished once and for all. It can serve no reasonable purpose to retain it in part. The present writer has on another occasion shown that this system is entirely unknown to any of the modern Continental laws. Where the flexible system has once been introduced, it has always been retained for good. The return to a system of fixed limits has never been advocated in any country which has had experience with the flexible system. Whether the fears of the Conservative Party Committee, that the expected lack of uniformity will lead to complaints, are justified, can, therefore, well be doubted.

4. The considerable amount of free discretion which under any system must be left to the certifying authorities makes it a very important problem to determine who is going to be the certifying authority. The Poor Persons' Committees of the various Law Societies have undoubtedly gained a great deal of experience in this field of work and have in many, though not perhaps in all, cases earned the well-merited confidence of all concerned. It is, therefore, not surprising that both Reports are inspired by the desire to retain this set-up whose further advantage to the public chest lies in the fact that the members of the Committees work in an honorary capacity. The Conservative Party Report wants to leave in the hands of the Committees all the powers that they have at present. The only reform that it suggests in this respect is that one social worker should be included as a member of the Committee so as to help in the investigations. The Labour Party Report takes a different view. It recognises that, as a number of legal writers have pointed out for some time past,[19] the Committees perform in fact judicial functions and that for this reason either the Committees should be reformed so as to offer at least some guarantee of judicial independence or an appeal should lie from their decision to an independent judicial authority. The Labour Party Report

[19] See Jackson, *The Machinery of Justice in England* (1940), p. 255; Egerton, l.c. p. 90; E. J. Cohn, 59 *Law Quarterly Review* (1943), pp. 273 ff.; Gurney-Champion, l.c. p. 85.

provides in High Court matters for an appeal to a special official of semi-judicial status, appointed by and responsible to the Lord Chancellor.[20] This "Regional Director of Legal Aid" is under the Labour scheme given a number of other important functions which will have to be considered below in connection with legal aid outside litigation. In addition to these functions he is to have jurisdiction to hear appeals from the Professional Committees.

If it is desired to retain the services of the experienced members of the Committees the introduction of an appeal from them to a Director of Legal Aid would seem to be a convenient solution. The only other alternative would be to leave the decision in the hands of a Master or District Registrar, or, in the County Courts, in those of the Registrar. The Labour Party Report, strangely enough, favours this alternative as far as legal aid in the County Courts is concerned, probably because the machinery of the Committees is considered as too complicated for County Court procedure. As has already been noted, it seems doubtful whether this division of responsibility would be workable in practice. The Conservative Party Report rejects the suggestion that the decision should in all cases be made by a Master or Registrar which had been made by the present writer[21] on the ground that it would involve the necessity of appointing a number of additional Masters in London and that it would impose a heavy burden on the District Registrars.[22] That this is a weighty objection cannot be denied. The Labour Party scheme would at first sight appear as a convenient compromise, as far as procedure in the High Court is concerned, but for one consideration which both reports seem to have overlooked. This consideration is intimately connected with the attitude taken by both reports to another problem, i.e. that of the remuneration of those members of the profession whose services are enlisted for legal aid in litigation.

5. Both committees have rightly come to the conclusion, endorsed, it is believed, by every legal writer on the subject,[23] that it is only fair for the members of the legal profession who serve as solicitor or counsel to assisted persons to receive remuneration for the work which they perform. The Labour Party Report does not say how much the remuneration is to be. The Conservative Party Report suggests two-thirds of the ordinary scale costs. There is little doubt that both branches of the profession could consider this as a fair and just solution and that the burden thus laid upon the Treasury is one that it could and should bear.

However, I am not sure whether the fact that the members of the profession do not officiate in the future on a purely honorary basis, does not add a further weighty reason to the grounds against leaving the administration of the scheme entirely in the hands of the professional bodies. Writers who have in the past considered the problem

[20] L. p. 19.
[21] E. J. Cohn, l.c., see note 19.
[22] C. p. 11, No. 14.
[23] Gurney-Champion, p. 39; Jackson, l.c. p. 253; Claud Mullins, *In Quest of Justice* (1931) pp. 390ff.; Egerton, l.c. p. 93; E. J. Cohn, pp. 359 ff.

and advocated the replacement of the professional Committees by judicial or administrative agencies have been motivated by the fear that the professional bodies might be suspected of turning down too many applications so as to diminish the burden imposed upon the profession.[24] In matrimonial cases the statistics prove that the Committees have in fact not been too ungenerous, but in other types of cases it would be much more difficult to disprove the suspicion from the published figures. However, it is not enough that justice is being done; it must also clearly be seen to be done. If one believes that it is in the interests of the legal profession not to be placed into a position where its representatives might seem to be judging their own causes, the remunerative character of the services of solicitor and counsel to the poor party brings a new difficulty. Might it not well be said that this scheme makes the profession judge as between itself and the taxpayer who has to bear the expenses of the scheme? Might not the victorious opponent of the poor party who cannot recover his costs justly blame the law for allowing the profession to impose upon him a burden, notwithstanding the fact that the profession has an interest of its own in burdens of this kind being imposed? It is bad enough for the profession to seem to be judge as between themselves and the poor applicants. It is more dangerous for them to be put into a position where they may appear to be able to levy at will a contribution for their own benefit upon public funds.

This difficulty is not removed by the suggestion contained in the Labour Party Report. Under the Labour Party scheme the assisted person has the right to appeal to the Director of Legal Aid if the Committee rejects the application. There is, however, no remedy in case of excessive grants on the part of the Committee. The interests of both the taxpayer and the opponent of the assisted party seem to be unduly neglected. It is suggested that it would be preferable in the interests of all concerned if the decision on the grant of legal aid would be left entirely with the Director of Legal Aid. That may increase his share in the work and responsibility greatly. It is, however, possible to ease this burden considerably by providing that every person requiring assistance has to lay his or her case before a Committee of the Law Society, before the Director finally decides upon the application. The Committee would investigate the case, obtain evidence about the financial position of the applicant, consider whether there is a prima-facie case, but would not actually decide about the case. Instead of deciding, it would merely report to the Director of Legal Aid in whose hands the final decision would rest. Such a solution would retain the experience of the Committees in the service of legal aid and secure for the representatives of the profession their proper share of influence, but would not burden them with a responsibility which may be harmful both to the profession and to the administration of legal aid.

[24] Gurney-Champion, p. 85.

6. The Conservative Party Report contains an important suggestion which, it is hoped, will not escape the attention of the legislator.[25] The Report recommends that the assisted person should be allowed to choose his or her conducting solicitor, provided the solicitor thus selected is already on the panel of solicitors willing to accept cases under the scheme or he is willing to join the panel under the scheme. The same right is granted with regard to Counsel. A solicitor chosen by the assisted person personally will always enjoy the confidence of his client to a higher degree than one who has been appointed for him. Even where the client himself is in fact unable to select his adviser and—as is the case so very often—must rely on the help of the Legal Advice Bureau for the selection, it is psychologically of the greatest importance, that he should have freedom of choice. To preserve the relationship of confidence between solicitor and client means to preserve the most important moral asset the legal profession possesses.

7. The Labour Party Report suggests that Order 16, Rule 28 (5) of the Rules of the Supreme Court should be abolished.[26] Under this rule the poor person is liable to deposit a sum of money with the Poor Persons' Committee to cover the out-of-pocket expenses of the conducting solicitor. At present the Committees require as a rule £5 and in special circumstances £10, or even more. There can be little doubt that this requirement places a very heavy burden upon the poor applicants who *ex hypothesi* do not earn more than £2 or in special circumstances £4 per week. There is, of course, as the Labour Party Report rightly points out, no precise information on the question to what extent this requirement prevents poor persons from actually bringing cases. In the view of the present writer this number cannot be quite negligible. It seems an elementary requirement of justice that a financial obstacle of this character should not prevent a poor party from bringing his or her case. On the other hand, it may well seem worth while to apply to this question the principle of equitable solution which the Conservative Party Report (which seems to have overlooked the question of out-of-pocket expenses) has applied to costs. At present the Committees fix the amount to be contributed in accordance with the presumptive requirements of the case. No regard is paid to the financial position of the applicant. As a rule a sum of £5 is demanded. If in an individual case the demand is increased to £10, this is done, not because the applicant can contribute more, but because the circumstances of the case justify the assumption that the actual expenses will be greater. The certifying authority should have power to treat the expenses in the same way as the costs. The amount which the party has to contribute depends not only on what is expected will be the actual expenditure, but also on the means available to the applicant. In fact it may be advantageous to treat expenses and fees as one combined item. This may simplify the matter as far as the applicant is concerned: few applicants are clear

[25] C. p. 12, No. 19.
[26] L. p. 19.

about the difference between costs and out-of-pocket expenses. And for the Committees the decisive question is only one: how much can this applicant afford to conduct this case?

8. The legal aid worker will probably be interested in quite a number of other detail questions which both reports have passed over in silence. Thus neither report mentions the question of legal aid in the House of Lords. Yet it is difficult to imagine that either Committee can have approved the present rule under which persons owning more than £2 per week have no chance of ever receiving legal aid in the Highest Court of the country. This, however, as well as a number of other problems was of too specialised a character to be included in the field covered by these reports. What has been said so far will be sufficient to show that both committees have tackled legal aid in litigation in a progressive spirit and that some of the most urgent demands of legal aid workers have met with a fair amount of understanding and appreciation.

II

Unfortunately it is impossible to say the same of the treatment of legal aid outside litigation in the two Reports. The Labour Party Report deals with this side of the problem very briefly. It contains a number of suggestions, but these are not fully developed and most readers will feel desirous of obtaining "further and better particulars." The Conservative Party Report on the other hand constitutes as far as this side of the problem is concerned a disappointment—all the more severe after the rather promising treatment of legal aid in litigation. The attitude in this part of the report is wholly negative. All the demands for a reform of the present system of legal aid are flatly rejected. The same Committee that had spoken so frankly of the shortcomings of the present law of legal advice in litigation, is so completely satisfied with the conditions under which at present legal aid outside litigation is tendered to the poor population that it concludes that no reform of the present position is desirable. The reasons for this remarkable conclusion would appear to deserve a somewhat closer study.

1. The problem of legal aid outside litigation has for a long time erroneously been considered as far more important than that of legal aid in litigation. Even an experienced legal aid worker, like Mr. Gurney-Champion, went so far as to state that "legal advice is the key to the solution of the problem of legal aid to the poor."[27] This view was also shared by the Finlay Committee with the disastrous consequence that the Committee thought it unnecessary to introduce any but the most insignificant reforms in the field of legal aid in litigation.[28] In late years this view has given way to a much more sober appreciation. It has come to be recognised that the best advice in the

[27] Gurney-Champion, l.c. p.14.
[28] *Cmd.* 3016.

world is of no use if there is no machinery by which it can be implemented or if the advice has to consist of nothing but the information that owing to lack of funds nothing can be done. Yet on the other hand there seems to be unanimity among all those who have written on the subject that present conditions in the field of legal advice are not what they should be. Among legal writers there is no dispute at all on the need for replacing the present system of legal advice on a charitable basis by a system which provides legal advice as a social service. Nor have legal aid workers left the world in much doubt on their view that the scope as well as the quality of the services which they can offer under the present financial arrangements, which leave the entire responsibility to private charity, are insufficient to cover the existing need. In 1938, Mr. Allen-Jones at a Provincial Meeting of the Law Society suggested that legal advice should be provided by a system of legal advice bureaux set up by the State.[29] In 1940, Dr. Jackson suggested that the only possible alternative to this suggestion was that the local Law Societies with the aid of a Government grant should provide legal advice facilities.[30] In 1942, the Haldane Society promoted an ambitious scheme, providing for a public legal advice corporation on the national level with branches in all the more important towns of the country.[31] Several writers suggested that such a centralisation of legal aid whose disadvantages and dangers are obvious, might be avoided by the setting up of municipal legal aid bureaux or by subsidising the existing Poor Man's Lawyer Centres.[32] Others have tried to combine legal advice with the Social Security scheme, which means resuming in a slightly altered form the old idea of coping with legal aid on a basis similar to that of the National Health Insurance scheme.[33] Whatever one might think of these various schemes, it seems at least to be clear that the present state of affairs is universally felt to be in need of improvement. The Conservative Party's Report deals with the problem at some length. But the conclusions at which it arrives are very different from those of all the other students of this problem. All that the Committee has to suggest is that the question should be reviewed at the end of 5 years after the termination of the war.[34] During this period nothing, it appears, is to be done. In the Committee's view there is not even any need for a Treasury subsidy for the existing Poor Man's Lawyer Centres. At least, the Committee sees no such need at present, but is prepared to review this question again after the expiration of five years after the cessation of hostilities.

It is not quite easy at the first glance to understand the Committee. It expresses admiration of the work done by the various Centres. It testifies to the fact that this work involves considerable labour and

[29] Allen-Jones, in 186 *The Law Times* (1938), p. 296.
[30] Jackson, l.c. p. 260.
[31] Haldane Society, l.c.
[32] Mervyn-Jones, l.c. p. 57 f.; Cohn, 59 *Law Quarterly Review*, pp. 259 ff.
[33] Schmitthoff and Terry, l.c.
[34] C. p. 18, No. 12.

sacrifice on the part of those who are engaged in it. It suggests that the scope of the work should be extended to rural areas and to those provincial towns where no Centre is yet in operation. But the Committee remains silent on the question how those who carry on this admirable work can be assisted and how the desirable extension to other areas is to be achieved. The Committee comments favourably upon the suggestion that a series of pamphlets dealing with the commonest problems arising in legal aid work should be prepared and distributed among the advisers at the Poor Man's Lawyer Centres. But the reader looks in vain for any suggestion as to how the means for such publications could be found.

This strangely passive attitude seems largely due to an ideological difficulty. Legal aid outside litigation is at present a form of charity. The Conservative Party Report is satisfied that it should remain a charity. Legal aid in litigation is, according to the same report, a different matter: it is the duty of the State to make sure that in Court both parties have equal rights. Yet outside the Court no such equality is desired. "The present system of providing free legal advice to poor persons in non-litigious matters," says the Conservative Report, "is the most satisfactory method of dealing with the problem."[35]

An eminent American writer has recently distinguished[36] four periods of development which legal aid work in the U.S.A. has passed through since the latter half of the nineteenth century. The first period he calls the Proprietary period, where legal aid work was conducted for a small group of narrowly defined persons, such as persons of a certain—usually foreign—nationality or for certain types of legal problems, such as assaults upon the virtue of women and girls. The second period is the Charity period, where legal aid is conceived as "giving help for mercy."[37] This was followed by the "dispensing-of-justice period" where legal aid work is considered as a part of the administration of justice so as "to translate the dream that there be justice for the poor and for the rich alike, into an absolute, incontrovertible fact."[38] Yet even this period is not the last, for it is succeeded by the latest stage of development, where legal aid work is considered as part of a social community task. The Conservative Party Report, it must regretfully be said, stands ideologically still in the second of these four periods.[39]

[35] C. p. 18, No. 11.

[36] Bradway, *Legal Aid Work and the Organised Bar* (1939), pp. 1 ff.

[37] Maguire, *The Lance of Justice* (1928) p. 22, quoted by Bradway, l.c. p. 5.

[38] Briesen, *Third Conference of Legal Aid Societies of the United States* (1914), p. 13, quoted by Bradway, l.c. p. 5.

[39] European Continental development shows that the stages were passed through in Europe very much earlier than in the U.S.A. The record of this country is in this respect not progressive. Flemish lawyers formed a "Brotherhood of St. Yvo" at Ghent, in the early seventeenth century for the purpose of advising and representing poor persons *pro Deo et sancto Yvone*. They received legal recognition and remained in existence until the annexation of Belgium by France. In Central Europe the tradition of canon law never permitted the absence of legal aid facilities either in litigation or outside litigation, see Hahn, *Die gesamten Materialien zur Civilprozessordnung*, vol. 1. (1880), p. 206.

It may be permitted to suggest that this is all the more surprising, just because the suggestion is made in a Report issuing from the Conservative Party. Legal advice outside litigation is a form of social service that is in the first instance meant to assist the individual. In the midst of thousands of laws, statutory orders and by-laws that are daily increasing the power of the State and the public corporations, the individual needs more than ever the assistance of trained advisers to inform him of the rights that are left to him. One wonders whether the Committee has seen that improvements in this form of social service do not mean an increase in state powers, but are required to help the individual in asserting those rights and freedoms that the social state of to-day has left in existence.

Yet the ideological difficulties which the Committee—subconsciously perhaps—seems to have experienced, explain the conclusion at which it arrived only partly. Part of the explanation lies in another field. The Committee, acting, no doubt, on such evidence as had been taken by them, adopted what is in the view of the present writer by far too optimistic a view—both of the present situation and of the chances of development of the present system. I shall try to substantiate this criticism as far as the space at my disposal permits.

The Report duly acknowledges the value of the work of the existing legal aid centres. No doubt, the Committee heard from those who gave evidence before it a splendid tale of achievements and successes. The deep impression which these achievements were bound to make seems to have prevented the Committee from seeing the other side of the medal: the difficulties and imperfections under which the work that is carried on inevitably labours at present. The same fate has befallen other observers before. The Finlay Committee, in 1928, also thought that praise for the charitable work that has been done and exhortations to the profession to join in it were enough.[40] Lord Maugham, writing in 1940, stated that he had been "enormously impressed by the activities of these centres or societies."[41] Yet he too failed to endorse any suggestions for their improvement. Admiration for the charitable efforts seems destined to bar the way to reforms which would render such charity unnecessary.

The Conservative Committee relied largely on the evidence on Poor Man's Lawyer Centres, collected by Mr. J. Mervyn Jones in his Report of 1940. That may account for some of the satisfaction expressed by the Committee, for the Committee seems to have overlooked that something like 25 per cent of the facilities, reported to be in existence by Mr. Jones in 1940, have meanwhile had to be closed down. Unfortunately the Committee heeded Mr. Mervyn Jones'

[40] *Cmd.* 3016, p. 5, No. 8.

[41] Lord Maugham, Preface to J. Mervyn Jones, *Free Legal Advice in England and Wales*, p. 5. He states expressly: "Lord Chancellors . . . can do little or nothing in the cases with which this book deals." This view is, of course, intimately connected with the opinion that legal aid is and should in the first instance be a charitable task. Lord Maugham speaks of the "great social and philanthropic value" of legal aid work.

views less than his factual statements. Mr. Jones warns clearly against just the course that has been adopted by the Committee. He says:[42]

> "It is useless and unjust to make further appeals to, or demands upon, the legal profession for their voluntary services . . . In the absence of a comprehensive State-aided system of free advice and assistance, voluntary bodies must continue to cope with the problem of assistance in the negotiation of settlements , . . They cannot do this satisfactorily so long as they are hampered by the absence of funds."

That funds are lacking can hardly be doubted. As the Conservative Party's Report rightly points out, there is no legal advice centre in the country that does more and better work than does the centre at Cambridge House of which Mr. Egerton is in charge. Yet what is the position with regard to its funds? In 1943, Cambridge House sent out circular letters appealing for financial help which contained the following sentences:

> Until Legal Aid is accepted as a public responsibility, the continuance of the much needed services we offer is largely dependent on the generosity of subscribers, since the grants we receive from the Ministry of Health and the Pilgrim Trust provide only about one half of our essential expenditure. Moreover, the expansion of our work has involved further expense, while the war and the increased cost of living has meant less voluntary help.

Similar appeals were sent out in 1944. The present writer has notwithstanding considerable efforts been unable to contact any one legal aid worker who would agree with the optimistic appreciation of the present situation which the Conservative Party Report propounds,[43]

A similar excess of optimism characterises the views of the Committee on the chances of future development of voluntary legal aid. It is true that the voluntary organisations were growing in strength in pre-war days. Yet it is not sure that that development will continue after the war or that it will suffice to cover the need. There will be a scarcity of lawyers. There has been little law teaching during the war. There were very few calls to the bar. Very few new solicitors were admitted. The material on which legal aid used to draw for its voluntary helpers, therefore, is largely no longer available. The tasks falling to our lot in the reconstruction of the Continent will constitute a further drain on the available personnel. The number of lawyers who

[42] Jones, l.c. p. 57.

[43] Demands for a subsidy were voiced already before the Finlay Committee (l.c. p. 10, No. 19). The Committee assured the witnesses who advocated a subsidy that "the consequences of such a proposal had not been fully appreciated" by them, because such a subsidy would entail some amount of state supervision. The strength of this argument can be assessed from the fact that the Treasury has for years made a grant to the Law Society and the Provincial Law Society with respect to the administration of the Poor Persons' scheme without claiming or exercising any control whatsoever.

will be absorbed by Unrra, the Allied Control Commissions in various countries, the Security League, etc., will not be negligible. The continuation of the controls in this country will lead to a number of lawyers or potential lawyers being retained in the Civil Service. Where are the voluntary workers to come from to staff the bureaux whose establishment is so urgently desired?

Certainly those who will be released from the Services will be permitted to look in the first instance after their own professional practices which they have for so long been forced to neglect. The public will appreciate their position. Lack of man power and not the bad will of the local practitioners is the reason for the much deplored absence of legal aid facilities in some of the smaller towns. The Conservative Party's Report stresses the deplorability of the absence of such facilities in many such towns. But the few solicitors, often hard-pressed by work and in some districts none too prosperous themselves, should be assisted in setting up facilities and not be made the target of further appeals. Those who are interested in the work would, if they could, do it without being appealed to. Those who are not interested will not be won over by pamphlets which they do not read. In this respect too we can but agree with Mr. J. Mervyn Jones' appreciation of the situation.

What is perhaps the strangest feature of the Conservative Party's Report is the suggestion of a five-year-waiting period after the termination of the war. This suggestion can, in the opinion of the present writer, only be explained by a curious feature in the arrangement of the Report. The Committee deals in the first part of its report at some length with the Legal Aid Scheme instituted for members of the Navy, Army and Air Force.[44] The Committee realised the importance of this scheme for legal aid in litigation. Yet when dealing with legal aid outside litigation this Scheme, now operating with such success, seems to have been completely overlooked or forgotten by the Committee.

The Committee states that the Services' Divorce Department, which now undertakes the conduct of all Service Divorce cases in Court, had in 1943 no less than 3424 cases assigned. All these cases are prepared before they reach the Services' Divorce Department by Unit Legal Advice Bureaux and Command Legal Aid Sections, the latter of which are staffed by full-time legal advisers. The divorce cases which actually reach the Services' Divorce Department form, of course, only a fraction of the cases in which the Unit Legal Advice Bureaux and the Command Legal Aid Section are actually consulted. The overwhelming majority of all consultations are terminated by legal advice on points that will never reach litigation. Such advice is very often concerned with matrimonial difficulties. The proportion of

[44] See the booklet "Free Legal Aid to Members of His Majesty's Forces," issued by the War Office (1942); for a short report on the practical working of the scheme see E. J. Cohn, "Legal Aid to Soldiers in the British Army," in 92 *University of Pennsylvania Law Review* (1943), pp. 166 ff. See also C. pp. 7 ff., with the latest statistical survey so far published.

cases in which litigation is advisable or possible is naturally small. The Legal Advice Bureaux of the Army have no statistics of their work. The present writer, who has conducted a Unit Legal Advice Bureau, is inclined to think that the proportion of matters in which mere advice is required to those which involve litigation, is something like 10 to 1. Yet this proportion is probably less favourable to legal aid outside litigation than would be the case in any legal aid scheme operating among the civilian population. The Manchester and Salford Poor Man's Lawyer Centre, according to its annual report for 1940–1941, dealt in the year 1940–1941 with 2805 cases. Only 216 cases were referred to a Poor Persons' Committee with a view to conducting litigation. In the year 1942–1943, the figures were 3097 and 246. In 1943, the Forces Legal Aid Scheme was not yet fully in operation. The Admiralty built up its part of the scheme during that year. Extension to Overseas Commands was not yet completed by the end of the year. It is, therefore, probably an understatement to say that the Army Legal Aid Scheme deals now annually with something like 50,000 cases. The termination of the war will inevitably bring the dissolution of this magnificent organisation—the biggest and in many respects the best legal advice organisation that this country (and perhaps any other country) has ever possessed. A vital social service, to which the serving man has become accustomed, is going to disappear without any trace being left, if nothing is done about it. It will disappear at a most crucial moment in our social history. For the end of the war will see the climax of domestic disputes resulting from the war and its aftermath. It will bring for the ex-service man hundreds of problems, not a few of which can be solved only by the lawyer.

Just for the five years following upon the end of the war legal advice is needed. It would have been easier to understand if the Conservative Committee had suggested that some temporary measures are all that is required, because once the immediate post-war period has been happily overcome, things will settle down. One might, perhaps, hope that at the end of some five years it will be possible to ascertain to what extent legal aid outside litigation is required under those "normal" conditions for which optimists are always inclined to wait. But to do nothing at all, as the Committee suggests, does not mean merely to leave things as they are. It means to permit a worsening of the situation, because owing to the disappearance of the Forces Legal Aid Scheme very much less legal aid will be available than is the case now. The present writer is unable to agree that this course is warranted by a realistic appreciation of requirements and possibilities.

2. In the opinion of the present writer the Labour Party Report gives in the field of legal advice outside litigation more ground for satisfaction. It proceeds on the basis that it is "the duty of the State to take all necessary steps to ensure that proper legal advice is made available for all poor persons who need it." One would perhaps have

concluded from this that the Labour Party would have felt inclined to adopt either the suggestion of a state-controlled or a municipal legal aid service or to recommend the setting-up of an organisation on the lines of either the Haldane Society's first scheme or of Messrs. Schmitthoff and Terry's comprehensive scheme. But the Report does not go as far as this. It suggests the retention of the present Poor Man's Lawyers' Centres and of the Citizens' Advice Bureaux.[45] The objection that the charitable character of the advice thus given would largely be retained is obvious. On the other hand, the Labour Party's Committee has provided for some sort of state supervision and co-ordination of the existing facilities, which would undoubtedly prove useful. This supervision and co-ordination is one of the functions of the Regional Director of Legal Aid, of whom mention has already been made in another connection. Further functions of these officers are to ensure that legal advice is made available in their respective Regions in places not covered by the present arrangements and to improve the existing facilities in co-operation with the Law Society and the Provincial Law Societies. All Bureaux are, where necessary, to be adequately staffed with paid workers and the Labour Party is ready to make provision out of public funds for the necessary financial assistance to these bodies. No fetters are to be placed upon the Bureaux by the introduction of an income limit for applicants. The Regional Directors are to be supported by Advisory Committees including representatives of Local Authorities, social workers and other qualified persons. The Lord Chancellor should have an Official in charge of the supervision and inspection of the entire system of legal aid inside and outside litigation.

One may well ask how the Regional Directors are going to perform their functions of supervision and co-ordination without having at least some powers or being able to dispose about funds. On these two aspects the Report is silent and in so far no doubt supplementation will be required. It would probably not be correct to assume that the Regional Directors would have neither powers nor access to funds. If both are provided it may well be that the scheme of the Labour Party Committee would have the advantage of a greater elasticity over more ambitious schemes and might, notwithstanding the objection to which attention has already been drawn, be better able to weather the storm of the immediate post-war-period. When that period will have passed the situation might be revised and the permanent needs—as distinguished from those which arise out of the present emergency—be ascertained.

The Labour Party Report contains one further suggestion that is worth being seriously considered. The Inns of Court and the Law Society are to be asked to consider whether a person before being called to the Bar or admitted as a solicitor should not be required to have devoted a period of three months to attendance at a Legal Aid Centre for instructional purposes. This suggestion comes at an oppor-

[45] L. p. 18.

tune moment. Considerable experience has been gained in the U.S.A. with the use of Legal Aid Centres for the purpose of law teaching. Professor Bradway, one of the outstanding pioneers of legal aid in the U.S.A., has just summarised his experiences in this field in a remarkable book[46] that goes a long way to show, how practical instruction in law can be systematised and deprived at least partly of its accidental and haphazard character. Here is a field where our universities could most profitably gain at one and the same time an important connection with legal practice and some foothold in the field of advanced legal studies. The three-month period of which the Labour Party Report speaks need not be spent entirely in legal aid work. It could be devoted partly to legal aid training and partly to advanced legal studies. Both can only win from the combination. On the other hand it may be preferable not to make this training compulsory. It is perhaps enough to provide for the opportunity. The number of legal aid bureaux is hardly large enough to accommodate all the law students of the country. And legal aid will gain no advantage from students who have to be compelled to take an interest in it.

Surprisingly enough neither the Conservative nor the Labour Party Report has given much thought to the question of safeguarding the interests of the opponent of the assisted party. Mr. Claud Mullins has rightly pointed out[47] that legal aid should not result in an oppression of the opponent of the assisted party. He has suggested conciliation before the Courts as one of the means to avoid this danger. The suggestion has not found much approval, mainly for the obvious reason that conciliation is not a task which can well be imposed upon a judge. It would be worth while to consider whether a strong legal aid organisation would not be able to undertake such conciliation. Here too the example of foreign, above all of American, institutions may with advantage be studied.[48]

[46] Bradway, *Legal Aid Clinic Instruction at Duke University* (Duke University Press, Durham, N.C., 1944). Mr. Egerton, of Cambridge House Settlement, has been good enough to point out to me the difficulties which will arise from the small number of legal aid institutions if the suggestion of the Labour Party Report should be put into practice.

[47] C. Mullins, *In Quest of Justice*, pp. 837 ff. The problem, which is also referred to in 89 *Solicitors' Journal* (1945), p. 124, is, of course, as old as legal aid. The Continental legislators have, however, usually thought it sufficient to protect the opponent of the poor party against an abuse of the poor persons' status by providing for the impartial investigation of the chances of the proceedings. There seems to be nowhere any provision compensating the opponent of the assisted party for any loss inflicted upon him by the fact that the assisted party cannot pay his costs. There is hardly sufficient reason for any liability on the part of the Treasury to compensate the opponent. The State is not liable for damage done by a taxi driver in the exercise of his profession although the grant of the licence made it possible for him to exercise it. Similarly there is no ground for any liability on the part of the Treasury if the poor person does not succeed in his or her case, although the support granted to him or her by the State made it possible for the poor party to conduct these proceedings.

[48] Conciliation in court has practically everywhere been a failure. Heber Smith and Bradway, *Growth of Legal Aid Work in the U.S.A.* (Department of Labour, Bulletin No. 607, 1936), p. 49, state that its history in the States has been disappointing. In Germany compulsory conciliatory proceedings preceding every action in the local courts (Amtsgerichte) were introduced during the

III

It remains to add that while the Conservative Party Report does not deal with Legal Aid in criminal cases the Labour Party Report notes that apart from the rules applicable in Courts of Summary Jurisdiction, the existing provisions for the defence of poor persons are adequate, but that the proportion of cases in which legal aid and defence certificates have been refused is a matter calling for inquiry. This comment is undoubtedly borne out by recent statistics. Yet it seems that the existing rules can hardly be improved upon. All that is needed is that those whom they are meant to benefit should be better aware of their existence. A strong legal advice organisation would undoubtedly provide them with this knowledge and lead to the desired improvement of the practical application of the Poor Prisoners' Defence Act.[49]

As the Labour Party Report rightly points out, the same does not apply to cases in the Courts of Summary Jurisdiction. Here the Poor Prisoners' Defence Act contains a rather curious restriction. While in cases which are tried before the Quarter Sessions or at the Assizes a defence certificate may be granted whenever it is desirable in the interests of justice that the accused should have free legal aid, in cases tried before the Courts of Summary Jurisdiction it is a further requirement that the desirability of defence should be due either to the gravity of the charge or to the exceptional circumstances of the case. On its own admission the Act, therefore, allows for the continued existence of cases where it would be desirable in the interests of justice that the defendant should have legal aid, but where no such legal aid can be provided because neither of the grounds which the Act has arbitrarily singled out are responsible for making legal aid desirable. The Labour Party Report suggests that this restriction should be abolished and, notwithstanding occasional opinions to the contrary,[50] this recommendation would be welcomed by most legal aid workers.

IV

The post-war period will, it seems, bring to the foreground another aspect of the problem of legal aid to the poor that has for some time past not been given much attention by legal writers in this country. English law has never made any difference between British subjects and foreign residents as far as the grant of legal aid to the poor is concerned. Similarly, legal aid can under the Rules of the Supreme Court be granted to persons residing outside the jurisdiction of the English Courts and, where this has been done, security for costs is not

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Weimar Republic. According to Rosenberg, *Lehrbuch des deutschen Zivilprozessrechts*, 3rd. ed. (1931), the result did not correspond to the hopes of the protagonists of this type of procedure. Similar experience has been made in France, see Denoyer, " Recent French Decrees, Modification of Procedure," in 18 *Journal of Comparative Legislation* (1936), p. 236.

[49] Jones, *Machinery of Justice in England*, p. 125.

[50] Mervyn Jones, l.c. p. 56.

being demanded from the poor plaintiff. Other countries are, however, by no means equally liberal and in a number of modern states legal aid to the poor is not granted to foreigners.[51] In the past this country could hardly take a strong stand *vis-à-vis* countries which in this way discriminated between their own nationals and British subjects, because the benefits of the English Poor Persons' Procedure were generally considered as not being equal to the benefits of the equivalent rules of Continental laws. The inevitable result was that the countries in question could with some justification plead that they had a right to be less generous with extending to foreigners the grant of their more extensive rights than this country while permitting the participation of foreign residents under the much more restricted scheme of English law. In the future it should be possible for this country to insist that British subjects receive the same treatment in respect of the grant of poor persons' status in foreign countries as do foreign residents and foreign nationals in this country.

But even this is probably not enough. The best treatment of a foreign poor plaintiff or defendant by the Courts of a country will not help if the legal aid organisations in the two countries concerned are not capable of handling international cases with reasonable efficiency. To help the illegitimate mother who has had a child from a soldier who has been serving for some time in this country, but has now returned with his army to his native land, is a problem which is at present beset with difficulties which probably no legal advice bureau in this country could overcome. Yet cases of this character are very numerous. To those who are involved in them there is no consolation in the fact that there are similar cases on the other side of the channel where soldiers from this country have been stationed.

The war has brought the problem of the displaced person. None like it has ever been known in European history. Legal aid can contribute a little to ease the situation of some of those who are suffering from displacement. Even though it is only little, it should not remain undone. The sufferings of those concerned are so great and the help that can be given them is so insufficient that there is no excuse for any failure to attempt the little that is possible.

In the opinion of the present writer legal aid is, therefore, a problem that should not only engage the interest of national bodies. It has its international aspect as well and the time is fast approaching when this aspect can be no longer overlooked. In 1924, the League of Nations initiated an inquiry on legal aid for the poor. The results are contained in a stately volume[52] that contains some good and some less reliable material. Yet nothing further was being done. The reasons for the complete failure of this gallant effort were twofold. There were no funds: even the modest means required for the enquiry had to be

[51] The most important countries where the status of an assisted person is refused to foreigners or persons of foreign residence are most of the States of the U.S.A. and many South American states.

[52] League of Nations, *Legal Aid to the Poor* (V. Legal, 1927, V. 27).

found by the Carnegie Corporation of New York. The recommendations offered by the committee that the League had formed[53] consisted in nothing but requests to the Governments: they ended, it seems, in the various departmental waste-paper boxes. What is needed is that strong legal aid organisations in several of the leading countries should take the lead and set up an international organisation to act as a clearing-house for information and to advise and assist in cases where this is needed. Here is one more reason why the proposals of the Conservative Party Committee, as far as legal advice is concerned, fail to satisfy. A strong legal aid organisation in this country could in co-operation with the National Association of Legal Aid Organisations in the U.S.A. solve a problem that has for some time past been urgent and will be more urgent than ever after the war. That such an organisation cannot be formed by the poverty-stricken bodies now conducting legal advice in this country, is too obvious to require proof. In this respect too it is a peculiar feature of legal aid that the individual can be protected only by an organisation backed by the strength of the entire community.

E. J. Cohn

MILITARY OCCUPATION AND THE RULE OF LAW[1]

IT is with a natural diffidence that a common lawyer invades the realms of the international lawyer and presumes to discuss some of the vital topics raised by the author of this most topical work. Important as are some of the problems of international law examined in it, there are, however, even more fundamental considerations involved which touch the foundation of law and politics, and which at the present time a common lawyer may be forgiven for wanting to discuss. He may, moreover, by his technical inability to consider anything but the broadest aspects of the matter, be able to present some of the main points brought out by Mr. Fraenkel[1]—and they are, some of them, life and death points—in such a way as to be helpful to the general reader.

The long-term occupation of enemy territory is a recent phenomenon in history. In old times, victorious States assumed dominion over those parts of the enemy's territory which they intended to annex and evacuated those areas which their armies had overrun, but which were not within their territorial ambition.

With the coming of the era of indemnities, occupation until these were paid, or satisfactorily provided for, became a necessary sanction, as after the Franco-Prussian War of 1870. After the first World War, however, although, as is well known, the obligation to pay heavy indemnity was exacted from Germany, the occupation of the Rhineland by the forces of the victorious Powers was undertaken rather to provide a safeguard for France and Belgium against further aggression than as a means of enforcing the indemnity clauses of the peace treaty.

[53] Heber Smith and Bradway, l.c. p. 114.

[1] *Military Occupation and the Rule of Law*, 1944, by Ernst Fraenkel, pp. x and 267 (with index) New York: Oxford University Press $3.50.

In retrospect, it is difficult to see how responsible statesmen could regard a fifteen years' occupation of a frontier area of the enemy's territory as a safeguard of any value. Against a repentant enemy, safeguards were unnecessary, but an unrepentant enemy would need more than that period to build up his resources for a second fling. The occupation of frontier territory would furnish little if any safeguard against such a process which clearly must go on in his main industrial districts as far removed as possible from outside interference. Moreover, at the precise period when the retained frontier area might be of value to the occupying armies for purposes of elastic defence, and in order that the first clash and destruction might take place on enemy territory, it was to be given up.

The occupation of the Rhineland as it was provided for under the treaty of Versailles could accordingly serve no useful purpose to the Allies. It could and did provide a constant thorn in the flesh of the proud, defeated enemy, and an ever-ready source of fresh quarrels and exacerbation. The gesture of withdrawal five years before the due date came too late to do any permanent good: if it had not been made, the position would hardly have changed materially.

If this analysis is correct, it would at first sight appear that no useful purpose is served from the point of view of setting up satisfactory arrangements after the present war by studying the history of the Rhineland occupation. This is not so. There is almost general agreement that the whole of the enemy's territory will have to be occupied, not so much for purposes of strategic safeguards as to enable the re-education of the population in political liberty and democratic government to take place: the only true strategic safeguard.

Granted the needs of this more extensive and thoroughgoing occupation, the study of the methods adopted in the Rhineland may, and indeed should, have a considerable value, provided, as Mr. Fraenkel says, we do not look to it for direct answers to the problems raised by the present struggle.

The first and fundamental point about the Rhineland occupation is that it was, after the armistice period had expired, a civil and not a military occupation. The American and British Governments, whose peoples had suffered less than the French and Belgians, and who were also more idealistic, if only sentimentally so, were anxious to provide a liberal solution to the problem of the Rhineland. They would not agree to French annexation, but as a compromise allowed occupation; while as a further compromise they exacted from the French that the occupation should be a civil one, and based therefore on the rule of law.

Such a civil occupation could either be carried out by the establishment of a new inter-allied administrative machine, or by the use of the existing German bureaucracy, subject to control by the occupying forces. The latter appeared to be the more liberal, as well as the most efficient and least expensive, alternative. It was therefore adopted.

This German bureaucracy was, however, the strongest and most efficient in Europe, and, moreover, remained part of the general machinery of government of the Reich. It should have been obvious, therefore, that it would struggle to maintain its own strength and independence, and the strength and independence of the German State against the invaders, and that if it were to be used at all, this must be on the strictest terms of subordination; otherwise a dual government, with the more efficient and impassioned Germans tending to get the upper hand, would come into being.

The terms of the occupation, however, took the form of an agreement, or treaty, "the Rhineland Agreement," which did not clearly leave the last word in all important matters to the allies. It is perhaps natural that this agreement, the first of its kind, should have been defective in many respects, but so it was. Some of the defects were due to the difficulty of securing agreement between the Anglo-American and the French viewpoints; and during the course of the drafting, as sometimes happens on such occasions, solutions were reached on important points considerably weaker than either of the protagonists had contended for, as when the American Pierrepoint Noyes successfully criticised the "extremely brutal document," but failed to get his own valuable skeleton plan substituted.

The agreement went so much into detail as to enable the Germans to contend with considerable force that where rights and functions were not specifically reserved to the allies, they were ceded. On the other hand, in regard to a number of matters the allies reserved right of action by means of language so vague as to enable them colourably to take action of a wide character subsequently.

Owing to the failure of the U.S.A. to ratify the treaty, and the consequent withdrawal by Great Britain from the provisional guarantee given to France, the French Government began to look for ways and means of escaping the application of the agreement, which it sometimes found in what can only be described as actions frequently infringing the spirit of the agreement, and sometimes the letter. At the same time the extreme chauvinist element in Germany naturally cashed in on the propaganda opportunities inherent in the occupation, and arising from the fundamentally unworkable character of the Rhineland Agreement.

Moreover, the rule of law established under the Agreement was based on Anglo-American conceptions under which it is always for the executive to justify action taken, as opposed to the continental constitutional philosophy which gives the executive full discretionary power except in respect of matters specifically excluded. In these circumstances, both French and German administrators were likely to take, and did take, views of their Powers' responsibilities mutually antagonistic to each other, and which inevitably resulted in a long series of clashes. It is, indeed, remarkable that so few of these were of a serious character, though their cumulative effect was to create an unpleasant, sometimes dangerous, state of tension.

This absence of serious trouble seems to have been partly due to the mediation of the Anglo-American authorities between French and Germans, and partly due to the anxiety of the occupying Powers, the French in particular, not in any way to assist the rather feeble revolutionary forces existing in Germany. Thus at the very beginning of the peace period the fear of left wing revolution drove the allied powers to begin that policy of appeasement which culminated in Munich and led inevitably to the Second World War. Thus recognition was refused to the workers' and soldiers' councils which had sprung up in the Rhineland as in other parts of Germany, and many of them were dissolved. In Saarbruck the French "punished the head of the local State railway agency because he had applied in his district the eight-hour day enacted during the first days by the revolutionary government in Berlin." Reminded of the revolution of 1789 by the Mainz socialists, General Mangin remarked that "in revolutions what first mounts to the surface is scum. That is exactly what your councils of workers and soldiers are." The occupying armies thus "threw their influence not only

on the side of law and order, but also on the side of the very elements of the population that represented the militarism and nationalism at the roots of the war itself."

The reactionary forces in Germany very quickly appreciated the opportunity which this attitude gave to them and took advantage of it to repress revolutionary elements not only in occupied Rhineland, but on the other side of the river, while the attitude of the French led to a "sudden outbreak of nationalism among groups that had hitherto proved immune to nationalist agitation."

There is here a very obvious lesson for the future. A military hierarchy has a natural inclination to buttress what it regards as stable elements and forces making for order, and to see eye to eye with its opposite numbers in the enemy hierarchy. The bias of the professional elements, particularly lawyers and administrators, called in to provide the occupational control is inevitably in the same direction. The swing of a revolutionary movement in its early stage is invariably extreme and likely to lead to bloodshed and disorder, so that the occupying forces who have had their fill of carnage, and suffer from *lassitudo certamine*, are almost certain to react against it. The recent events in Greece seem to furnish a straw in the wind, and show that before we know where we are history may begin to repeat itself. The only remedy for this state of affairs is a strong political policy clearly laid down, and to which the soldiers and administrators are relentlessly held by constant political supervision, on lines perhaps indicated by Mr. Mcmillan's continued presence in Greece. A set up of this kind is one not easily attained, and difficult to keep in being over a long period.

Mr. Fraenkel has written a careful and well-documented account of the Rhineland occupation from its beginning down to the time when the United States Government withdrew. His work is written from an American angle and, while documented from all sources, is to some extent based on personal communications from members of the U.S.A. delegation and forces of occupation. The French, with whom the Americans were often in conflict, come into the picture a great deal; the English who, generally speaking, shared the views of the Americans, are not much mentioned.

Mr. Fraenkel's approach to his subject is that of a lawyer, and perhaps more that of a public lawyer than of an international lawyer: the international law aspects of his work are handled in a non-technical manner and should cause no difficulty to a reader not versed in that subject. Although the legal aspect is of great importance and is, of course, the one which the author has chosen for discussion, the whole problem was fundamentally one of politics. Mr. Fraenkel occasionally forgets this, as in the later part of his treatment of the subject of war criminals, in which, straying from the historical field, he makes some unrealistic proposals for dealing with the criminals of the present war. Again from the political angle, the psychology both of the occupying forces and of the German people conditioned the whole problem in a fundamental degree. Here and there the importance of the matter is recorded, but as it were by accident. A more conscious approach on the psychological side would undoubtedly have improved the work.

In view of the topicality of the subject, its importance, and the fact that this book may not be easily available to readers in this country, I propose now to summarize the main points brought out in it.

Mr. Fraenkel divides his study into two parts: the armistice period, and that of the Rhineland Commission. In the former, the occupation was, of course, military and subject to the terms of the Hague Convention. It soon ceased to be a pure military occupation, however, because the forthcoming Rhineland agreement cast its shadows ahead, and the development rapidly became "characterized by a progressive substitution of military control by the control of civil agencies whose dependence on military authorities became less and less marked." Moreover, even at this stage the allied officials "confined themselves to supervising the German bureaucracy."

In these conditions it is not surprising that the ingenious German lawyers soon began to contend that even during the armistice period the occupation was not a purely military one, but a mixed type of pacific and belligerent occupation based on the armistice convention and christened by Karl Strupp a *Mischbesetzung*, and this view was afterwards in 1920 accepted and adopted by the *Reichsgericht* (the German Supreme Court), although it had earlier decided to the contrary in the *Uhlmann* case. But by 1920 the battle against the Versailles Treaty had already been joined, and German courts were seeking for ways to avoid principles which they had themselves laid down during the occupation of Belgium and Northern France.

In the armistice period, too, economic considerations at once began to play an important and disturbing part. Although Marshal Foch was generous and even punctilious in carrying through the occupation in accordance with the Hague Convention, too many of his subordinates considered "the furtherance of private business interests a part of their patriotic duty." As the commanders of the individual armies were autonomous in their own territories, scope for such action was substantial, and advantage was taken of it. The economic necessities of the Rhineland area, practically severed as it was from the remainder of the Reich, were dire, and the advantage which was taken of this by French business men to pour in a flood of shoddy and expensive products created the worst possible atmosphere in which the experiment of a civil occupation could be carried out: as a French officer said, "the occupied territory was regarded as a richly-laden plum tree to be shaken for our benefit."

This "hole in the west" naturally gave rise to a violent reaction in the rest of Germany; and in May, 1919, the German cartels began to proclaim a boycott against French firms, and this marked the opening of a struggle which went on for a number of years "between German economic power and French political and military strength," an examination of which would take us into the inflation, into the occupation of the Ruhr, and even further afield. No real steps were taken to deal with this situation until after the armistice period.

In the administration of justice, each army of occupation acted on its own authority, and the local residents, in so far as their actions in relation to the allied forces had to be punished, were dealt with sometimes by the military tribunals and sometimes by their own national courts, on the remission of the allied authorities. Otherwise they were left to their own courts, except in regard to German prosecutions for high treason, where the allies claimed, and rightly, the liberty to interfere.

On the general administrative side all the leading officials, as well as their subordinates, were allowed to remain in office, and, although the

right to dismiss and replace them was reserved by the occupying powers, very little use was made of it.

As has been emphasized, the allies "cast their votes on the side of the traditional forces" in Germany, and nowhere was this more evident than in respect of labour problems. The revolutionary forces were, of course, largely identified with labour, and the strike was one of their chief weapons. Military hierarchies the world over appear to be inherently antagonistic to organized Labour. The Americans, whose policy in the occupied areas appears to have been, generally speaking, more liberal than that of the other allies, adopted quite a different attitude towards Labour, a reflection no doubt of the intolerant feeling towards Trade Unionism which is prevalent in the U.S.A. They forbade all strikes among workers employed by themselves, and attempted to do so generally among all workers in public enterprises. They were even accused by a French writer of using "brutal methods of repression." They did, however, set up boards of conciliation, which had a good deal of success.

When the period of peaceful occupation arrived, the control of the occupying armies was transferred to the High Commission, which developed a fairly elaborate organization, with 115 officials and about 1,200 clerical employees. The decisions of the Commission were by majority vote, and the British and U.S.A. Commissioners were frequently ranged against the Belgians and French. It worked largely through specialized committees. It issued ordinances of a general nature applying to the public, and instructions to public authorities and officials. As has been seen already, the activities of the Commission were carried out indirectly through the German bureaucracy, though sometimes it acted directly through its own machinery, or through the occupying military forces.

The High Commission not only claimed legislative power over the Rhineland, but also to decide whether German legislative acts should be applicable there, which gave rise to an important controversy, for the Germans contended that by virtue of the sovereign power of the Reich, their statutes came into force automatically in occupied territory, while the High Commission regarded its consent as a condition precedent to their validity: a dispute on which neither side gave way.

The High Commission retained the right to declare martial law, though it only once made use of it. Although it also took command of the occupying forces, its control over some of the generals was not so close as was desirable, and there was some unauthorised interference in Labour disputes by French generals like Mordacq.

A source of constant friction was the appointment by the High Commission of local representatives for liaison purposes. This the Germans contended was an infringement of Article 5 of the Rhineland Agreement, under which local administration was to remain in their hands. On a formal construction of the article, there was much to be said for the German viewpoint, because the local representatives inevitably came to exercise executive powers, and it is difficult to see how the Commission could have carried on its work without such organization. The truth is that the agreement was framed without adequate appreciation of the practical problems which were likely to arise, as will inevitably be the case when attempts are made to legislate for an entirely new situation. A set up based on a rigid contractual system of a type favoured by English and Americans in their commercial dealings is not sufficiently elastic for the requirements of peaceful occupation. Moreover, it is inevitable

that the defeated side should make every use, both in substance and technicalities, of such a situation. The Germans certainly did so, and are now reaping in the "unconditional surrender" policy of the allies one result of their propaganda in the inter-war years.

The High Commission refused to give way on this point, and "local representatives were appointed in all administrative units that had any significance." "This amounted to a considerable interference with the hierarchical structure of the German bureaucratic machine, for it was likely that the German officials wholly subject to the directions of their superiors would frequently have difficulty in explaining to the local representatives, without assistance, administrative acts that originated not in their own initiative, but in orders from above."

After Locarno, the local representatives were abolished and replaced by the civil affairs branches of the army. "It is noteworthy that six years after the Americans had suggested, for the sake of the German population, that civilian authority be entrusted with the administrative side of the occupation, the Germans themselves desired the replacement of the local civilian administrators by administrative sections of the army." "The basic ideas of the Rhineland Agreement originated from and corresponded to Anglo-American political concepts, and neither the Germans nor the French knew how to put these principles into practice in accordance with the spirit that animated them."

On the economic side the trade war of the armistice period came to an end, and until the imposition of sanctions by the Allies in 1921 for the purpose of securing the promised reparations, there was little interference in the Rhineland. The High Commission then became the executive organ of the allied governments for reparation purposes, and began to control customs, the alcohol monopoly, and imports and exports generally by means of a license system. This active economic policy at once had its psychological repercussion. It was resisted strenuously by many Germans, while many others were prepared to collaborate, so that inevitably "the practice of boycotting the collaborationists developed." The Commission naturally endeavoured to protect those who were prepared to work with it, and "a basic change in the substantive law of the occupation," enforced by a new type of administrative agency, resulted. Eventually after the withdrawal of sanctions late in 1921, when the German Government gave new assurances as to the fulfilment of reparations, a compromise arrangement was reached in the Rhineland, which was, in effect, a joint economic administration, and which worked reasonably well.

The whole of this episode is of great significance, as a very similar state of affairs may easily develop in the next Germany, and particular attention should be given to the part played in it by the German cartels and the use made of them by their own government in waging this economic warfare.

The German Government appreciated at a very early stage the advantages which might be derived from a skilful use of the Rhineland Agreement, especially if strong leadership were provided on the scene of action, and on July, 1919, appointed a *Reichskommissar*, an appointment to which the allies assented. The appointee, Von Starck, was an able and industrious man, but of a rigid disposition and unversed in politics. He at once got across with the French by refusing to attend a dinner party commemorating the inauguration of the High Commission. As Mr.

Fraenkel points out, the French were not very realistic in expecting collaboration of such a character. Feeling about the occupation was naturally strong among the Germans, and it was alleged by the Reichstag deputy, Sollmann, to have contributed, within eighteen months, more to the growth of chauvinism than all the pan-German agitators combined.

Considerable friction, and better-based, developed between von Starck and the High Commission. He viewed his problems "as a chain of legal cases rather than as a political phenomenon," but in any case his position "between the Scylla of public opinion in his own country and the Charybdis of the dominating elements of the High Commission" was an almost impossible one.

One of the genuine difficulties of the subordinate German administrators arose from the conflict, which was endemic, between loyalty to the statutes of the Reich and the orders and directions of their own superior officers in Berlin on the one hand, and the superior ordinances of the High Commission on the other. This might present a real problem to an honest man, while it presented a golden opportunity to the saboteur. The pedantic attitude of the *Reichskommissar* did nothing to aid the solution of this problem.

"By far the most important problem in the High Commission's relations with the German bureaucracy was the personal question of appointment, promotion, punishment, and dismissal of individual officers." The Allies did not at first appreciate the fundamental importance of the bureaucracy in German life: the German Government, well aware of it, were determined by hook or by crook to retain their complete hold, and claimed that only in case of breach of an allied ordinance could dismissal take place. In July, 1920, the Commission finally declared its right to "veto the appointment of any German official," but it was not until the time of the Ruhr conflict that access to the files of the German agencies in occupied territories was claimed—"an essential measure for an efficient supervision of German administration."

"This issue reached its sharpest expression in the conflict . . . in regard to personnel in the school administration." Catholic teachers from districts ceded to Poland were drafted into the Rhineland. They were "among the most fanatical nationalists of all Germany. Not only were their pupils in the Rhineland educated in an ultra-nationalist spirit, but also their chauvinism exercised a considerable influence on public opinion in the villages and smaller towns." But the Weimar constitution provided for "international reconciliation" in educational matters, and on the basis of this the Rhineland Commission claimed the right to intervene. Yet, in spite of all the controversy which arose over the matter, they had, up to the time of the Ruhr conflict, objected to only nine teachers—and incidentally to only five customs officials, two police officers, one railway official, and one official of the general administration.

Some of these cases, e.g. that of Momm, president of the Wiesbaden district, attracted widespread interest and excitement in Germany, out of all proportion to their intrinsic importance. "It is hardly possible to overstate the significance that republican Germany attributed to the legal provision intended to protect officials, employees, workers from dismissal without cause"—the status of all employed persons was indeed approximated to that of the bureaucracy. "This principle which dominated the legal thinking of the broad masses of the German population must be borne in mind in order to understand why the Germans reacted so

vehemently to the civil service policy of the occupation authorities. The representatives of occupying powers, educated under different economic, social, legal conditions, are likely to be wholly unaware of the sensitiveness towards certain of their measures on the part of the population of the occupied country. Under the peculiar conditions of legally-governed military occupation, comparative law ceases to be the hobby of a few scholars, and becomes a matter of vital importance for the handling of delicate questions of government and administration." "From a psychological point of view, the co-existence of two forms of government—a rule of arbitrariness and a rule of law—is probably harder to endure than an outright rule of martial law."

In the field of public utilities, the various problems were handled much more moderately and satisfactorily, for passions were not aroused; and in labour matters, too, as soon as things had settled down, difficulties were not so numerous as might have been expected. In coal mines and public utilities no strike or lock-out was allowed "until the dispute had been submitted to the conciliation authorities prescribed by German law, and therefrom an appeal lay to a board of conciliation appointed by the High Commission. Their decisions were not compulsory, nor were they empowered to prohibit labour conflicts." Another interesting problem was that as to how far, if at all, the Commission's agencies in the employment of German labour were subject to German public law, in regard to which the German courts very sensibly adopted a negative attitude.

The provisions of the Rhineland Agreement relating to the administration of justice were "contained in four short paragraphs," which were afterwards supplemented "by a long and highly controversial ordinance (No. 2), which the Germans alleged, "with technical justification," went beyond the terms of the agreement. The only courts set up by the Allies were the military tribunals which had existed during the armistice. These were given jurisdiction over persons who committed "offences against the persons or property of the armed forces": other jurisdiction remaining with the German courts. The jurisdiction conferred upon the occupation courts, if interpreted according to the German submission, would have afforded "the armies no protection from attacks directed against their existence, their inner structure, or their honour, or from actions, such as disturbances of public order, which might indirectly threaten their security." Such crimes, said the German jurist Heyland, could only be dealt with by the German courts!

Ordinance 2 was a realistic rebutter of such argument, but how difficult it was to put up a technically sound rejoinder is clear from the sophistries of the answer to the German protest sent by Millerand in March, 1920: "If occupying powers are compelled to use, as justification for such vital activities, arguments so flimsy" as these, "the principle of military occupation controlled by the rule of law is gravely discredited."

The German authorities brought tactless prosecutions in their own courts, e.g. the *Korn* case, when a baker employed by the French was prosecuted for infringing the eight-hour day, and the High Commission reprieved equally tactlessly, e.g. in the *Smeets* case, when the separatist leader Smeets was found guilty of a personal libel on Ebert, President of the Reich. This decision, taken in opposition to English-American opinion, "actually brought about a united front in the Rhineland. It was of little help that in average cases the occupation authorities observed the law

satisfactorily. Public opinion does not notice the every day activities of the courts. One big case like that of Smeets overshadows the wisest application of the law in a thousand small cases."

Although it is only on the fringe of the subject, since under any form of occupation the cases must have been reserved for military courts, the problem of the *Schwarze Schmach* must be mentioned. Actually, "no more than a hundred offences of all kinds were attributable to the 24,000 coloured troops in Germany," but American susceptibilities on this matter are so sensitive that the Germans were able to make first-class propaganda out of it. It is one of the ironies of the times that the Germans scored their most considerable propagandist success in a field where they had not even a colourable grievance.

In purely civil cases, jurisdiction over which was not specifically mentioned in the Rhineland Agreement, the Allies went so far as to concede jurisdiction over their own forces to the German courts subject to a right of evocation in cases of abuse. They proposed to set up mixed courts to deal with such cases, but the Germans refused to make appointments to them. However, the decisions of the German courts seem to have been beyond reproach, since none were reversed.

Bastardy cases were, however, withdrawn completely, since the Commission decided that the mothers must bring their proceedings before the national tribunals of the putative fathers, a course which was for practical purposes impossible. It was primarily, therefore, in contract cases and certain tort cases that members of the allied forces were subject to German civil law.

In some ways the most difficult problem in connection with the administration of justice was that of the police. The Rhineland Agreement attempted no definition of the powers of the allied military police, contenting itself with a provision (Art. 4) under which the occupying powers were entitled to the assistance of the German police on request in connection with persons subject to the jurisdiction of the military courts. This "omission of any provision for police authority over Germans who were subject to the jurisdiction of the military courts revealed a serious lack of understanding of German political and administrative traditions." "In order to create a *Rechtsstaat*, it was not sufficient to proclaim the principle of 'supremacy of law.' There had to be a structural co-ordination of occupation law with the law of the occupied country. If the authors of the Rhineland Agreement had written that document not in the spirit of Anglo-Saxon distrust of the executive branch of the government, but with an effort to achieve a structural co-ordination of occupation law with the German *Rechtsstaat* system, they might have accomplished their purpose—an efficient occupation government, controlled by law, smoothly co-operating with German agencies."

I think that Mr. Fraenkel is unduly optimistic in this estimate, and it seems doubtful whether with a population, and particularly a bureaucracy in the frame of mind then existing in Germany, and fomented continuously by chauvinist elements, the attempt to set up a rule of law system was ever a practical proposition, at any rate with the haste with which it was put into operation. The whole of the chapter is of great interest and can teach valuable lessons for the occupation of Germany after this war, whatever the precise form it may take.

The position in regard to the police furnishes a particularly good test of the dual system which the Rhineland Agreement attempted to set up,

and demonstrates its fundamental unsoundness better perhaps than anything else. The control by a State of its police force is such a fundamental attribute of sovereignty, that the position in the Rhineland was a constant slight to the German republican government, of which its antagonists did not hesitate to avail themselves. On the other hand, since the Agreement did not provide powers for the military police of the occupying powers, every use of the latter in connection with German nationals, and the necessities of the situation forced such use, gave rise to grievances, and on the face of it destroyed the civilian character of the occupation. On the other hand, it was not possible effectively to rely on the German police and prosecuting authorities, who in cases of political significance were in a position to act as "co-conspirators with their fellow nationals." The most extreme German publicists, such as Nelz, contended indeed that the High Commission had no power to accept responsibility for public order in the occupied territories, since under the Rhineland Agreement that had been entrusted to the local police forces!

The Commission sought refuge in their power under Article 3 of the Agreement to issue ordinances necessary "for securing the maintenance, safety, and requirements of the allied forces," to which they contended the use of the military police and courts was a necessary incidental or implied right. In the last resort power lay with the Commission, but propaganda with the Germans. Incidentally, the Cour de Cassation at Paris held that the wider construction of Article 3 was the correct one, but significantly based its arguments on the protection of the "interest of the French State."

Nevertheless, in a number of matters the Rhineland Commission held that it had no power to intervene in the German administration of the Rhineland, even, for example, when its action in spending large sums on the improvement of the railway systems appeared to interfere with payment of reparations. There was, indeed, a strange mixture of constitutionalism and arbitrariness; but while the Allies incurred all the odium of the latter, they got no credit for the former.

Since German courts continued to function, they were naturally subject to the control of German appeal tribunals. As long as allied interests did not become involved in such appeals, there was no difficulty about this. From time to time, however, they were bound to do so: for example, in a case where the Americans attempted to regulate the prices at which old war stores lying in the occupied areas should be sold. In its comparatively chastened state of the early days of the occupation, the *Reichsgericht* held that it had no power of review in such cases; but later on, as the resistance movement became bolder, it was only too ready to challenge allied action in such matters. This attitude must no doubt be regarded as quite natural, but that it should have grown so strong and so quickly may be regarded as a useful reminder for the future. A dual system of justice can only be effectively worked under occupation conditions if one side is in all cases of conflict given the clear and undoubted superiority, and, in particular, if the question of judicial review is reserved to it beyond doubt.

Mr. Fraenkel well summarizes his conclusions in the following paragraph: "The Rhineland Agreement, which was in many respects similar to the Covenant of the League of Nations, was an idealistic model plan for an occupation statute rather than a treaty created for the solution of one of the most complicated problems of post-war Europe. If a statute

does not correspond with the realities it is supposed to deal with, idealists are always encouraged by the hope that facts will be adapted to the law, realists by the belief that law will be adapted to the facts. In the occupied Rhineland, the realists triumphed over the idealists." But at a great cost in missed opportunities. The opportunities of the next years are not the same, but they are fundamentally similar; and in order that they may not again be lost, those responsible for policy, and those charged with its execution, might well do worse than to make Mr. Fraenkel's book a vade-mecum.

R. S. T. CHORLEY

CARTELS AS INSTRUMENTS OF INTERNATIONAL ECONOMIC ORGANIZATION

PUBLIC AND PRIVATE LEGAL ASPECTS OF INTERNATIONAL CARTELS

I

"RISING standards of living, full employment, social security and economic development" are the social objectives of the post-war world[1] and it is generally recognised that "the fullest collaboration between all nations in the economic field will be essential to this achievement."[2]

The general acceptance of these "five major objectives of post-war preparation and planning" does not imply acceptance of any particular methods for their achievement. This applies especially to International Cartels which, in the past, have been important instruments of economic co-ordination. International Cartels have been the object of widely differing opinions since the very beginning of their activities. While they are hailed by some as the pillars of international economic co-operation, they are condemned by others as social evils which must be destroyed in the post-war world.

In order to find out whether and on what conditions international cartels are acceptable as instruments of international economic collaboration, it is necessary to analyse their economic and public and private legal aspects.

International cartels are cartels either between Governments or between private parties which do not belong to one and the same

[1] International Labour Office. *The Common Interest in International Economic Organisation* by J. B. Condliffe and A. Stevenson, Montreal, 1944, (subs. cited as *Condliffe*) p. 126.

[2] *Ibid.*, p. 7, and *Atlantic Charter*.

country, or between both Governments and private parties. Private parties may be individual enterprises or cartels.[3]

Cartels belong to one of several types of industrial or commercial combinations whose "main object is to replace individual and completely free competition by a collective organisation intended to regulate and rationalise production and to influence prices with a view to their stabilisation."[4] They are contractual agreements between independent undertakings (individuals or firms or associations or companies) in the same or similar branches of industry.[5]

The legal form of a cartel may be that of simple tacit agreements, of gentlemen's agreements, or of a proper contract, or again it may be that of an association or a company with a separate legal personality. Such agreements are concluded "for a specified or unspecified period between a certain number of hitherto competing firms which agree, for example, to fix their quotas of production, delimit their respective markets either in the home country or on the export market, regulate market zones and selling prices, communicate to each other new processes, standardise types of manufacture, make uniform terms for the purchase of raw materials or the sale of finished products or, again, to restrict certain special factories to specified manufactures with a view to eliminating unnecessary transport and reducing cost of production."[6]

Cartel agreements are obviously in restraint of trade. Restrictions of freedom of trade are their purpose and the very foundation of their existence. The laws of different countries differ in their attitude as to whether and on what conditions cartels are to be recognised as legitimate means of concerted economic action or to be regarded as an illegal conspiracy and therefore null and void or even punishable.[7] The legal aspect of cartels varies with the economic views and position held by the legislative powers of the respective state.

It is evidently not within the province of the lawyer as such to take sides in the discussion about the economic effects of cartels, whether they are beneficial or detrimental to the community of consumers, and whether they should be encouraged or exterminated. It will, however, be necessary to consider very carefully if this question arises at all. If it did arise in this form and had to be answered by a death sentence

[3] Callmann, *Die Lage der internationalen Kartelle auf der 38. Tagung der International Law Association in Budapest*, 1934, in Kartell-Rundschau, Berlin, 1934, pp. 579 ff.; *The International Business Conference*, Rye, New York, 1944, *Joint Report of the British Delegations*, p. 4. Milo Perkins, "Must American Business Join in International Cartels," in *Harper's Magazine*, Nov., 1944.

[4] League of Nations, Economic and Financial Section. *Review of the Legal Aspects of Industrial Agreements*. Prepared for the Economic Committee by Decugis (France), Olds (U.S.A.) and Tschierschky (Germany). Geneva 1930, p. 5.

[5] League of Nations: General Report on the *Economic Aspects of International Industrial Agreements*. Prepared for the Economic Conference by Benni (Italy), Lammers (Germany), Marlio (France), and Meyer (Luxemburg). Geneva, 1931, p. 8.

[6] *Review of the Legal Aspects of Industrial Agreements*, etc. (see footnote 4), p. 6.

[7] Cf. on *Rule of Reason*, *ibid.*, pp. 93 ff.; Koch, *Grundzüge des englischen Kartellrechts*, 1927, pp. 14 ff.; *Review of the Legal Aspects*, etc., which gives a survey of various national cartel laws.

of the cartels, it would clearly be superfluous to consider cartels any further or to try to make any suggestions as to an international scheme of cartel control.

II

International Cartels have existed for over sixty years and operated first in the field of the iodine, potash and bismuth industries.[8] Later international agreements were reached on nickel, aluminium, zinc, mercury, calcium carbide, platinum, sugar and quinine. The first world war interrupted the development of the international control of world production and trade by cartels and swept away the great majority of existing controls. But the existence of numerous control boards during and immediately after the war soon led to a revival and increase of the international control system.[9] "In the decade following the first world war, severe industrial dislocation made such agreements seem more desirable, and between 1922 and 1929 rubber, copper, steel, coal, nitrates, and cement, electric lamps, wire, and many products of the dyestuffs industry were added to the list of 'controlled' materials. With the onset of the depression the pace of organisation quickened enormously, and production and other direct controls spread to wood pulp of various types, to rayon, to paper, and to various products of the chemical, electrical, and many other industries."[10]

1. International cartellisation was, for the first time, discussed at Geneva at *The Word Economic Conference in* 1927. In preparation and in consequence of the resolutions of the conference the League of Nations published a series of monographs on the economic and legal aspects of international cartels.[11]

[8] Laurence Ballande, "*Essai d'etude monographique et statistique sur les ententes economiques internationales,*" Paris, 1936.

[9] *Condliffe*, p. 53.

[10] *Ibid.*, cf., p. 76, where the proportion of international trade which is actually regulated by overt agreement is estimated at 17 per cent. In *Legal Aspects of Industrial Agreements*, Geneva, 1930, p.6, the following products are mentioned as under international cartel control: Raw Steel, Zinc, Copper, Pig-Iron, Ferro-manganese, Ferro-silicium, Rails, Thomas basic slag, Diamonds, Cement, Magnesia, White Lead, Calcium Carbide, Pneumatic tyres, Iodine, Quinine, Glauber salts, Dyestuffs, Riveting materials, Plate glass, Nitrogenous fertilisers, Electric lamps, Incandescent mantles, Paper, Plaited articles, Tanned leather, Metal buttons, Velvet, Maritime Freights, etc.

[11] *The Social Effects of International Industrial Agreements. The Protection of Workers and Consumers*, by William Oualid, submitted to the Preparatory Committee for the International Economic Conference, Geneva, 1926.

Cartels and Combines, by Dr. Kurt Wiedenfeld, submitted, etc., Geneva, 1927.

Cartels and Trusts and their Development by Paul de Rousiers, submitted, etc., Geneva, 1927.

International Cartels, by D. H. MacGregor, submitted, etc., Geneva, 1927.

Recent Monopolistic Tendencies in Industry and Trade being an Analysis of the Nature and Causes of the Poverty of Nations, by M. Gustav Cassell, submitted, etc., Geneva, 1927.

Review of Legislation on Cartels and Trusts, drawn up by Clemens Lammers (Germany) for the Economic Conference Geneva, May, 1927.

Review of the Legal Aspects of Industrial Agreements, prepared for the Economic Committee of the League of Nations by Henri Decugis (France), Robert E.

The World Conference of 1927 brought about no theoretical or practical solution of the problems involved.[12]

The Final Report[13] came to the conclusion that "the phenomenon of such agreement, arising from economic necessities, does not constitute a matter upon which any conclusion of principle need be reached, but a development which has to be recognised and which, from this practical point of view, must be considered good or bad according to the spirit which rules the constitution and the operation of the agreements, and in particular according to the measure in which those directing them are actuated by a sense of the general interest."

The Monetary and Economic Conference of the League of Nation was convened *in London in* 1933, in order to consider ways and means of overcoming the economic crisis of the world. Among these ways international co-operation by agreements between producing and consuming countries in the field of agricultural commodities and certain raw materials took a prominent place.

The Governments found it their urgent task to restore the equilibrium between supply and demand for the basic materials of world production in order to secure the economic balance and political stability of their countries.[14]

> (1) Opinion was "divided as to *whether* in normal times, the framing of *agreements regulating production and trade is in principle desirable*, but it seems obvious that the exceptional period through which we are passing may call for exceptional remedies. Consequently several delegations have insisted on the necessity of avoiding the impression that the adoption of measures to co-ordinate production can be defended except as a temporary expedient employed in abnormal circumstances.[15]
>
> (2) It was unanimously resolved that *Agreements on international co-ordination in production and marketing should be based on certain* leading principles.[16]

Olds (United States of America), and Siegfried Tschierschky (Germany), Geneva, 1930.

General Report on the Economic Aspects of the Industrial Agreements, prepared for the Economic Committee by Antonio St. Benni (Italy), Clemens Lammers (Germany), Louis Marlio (France), and Alois Meyer (Luxembourg), Geneva, 1931.

Review of the New Legislation concerning Economic Agreements, (Cartels, etc.) in Germany and Hungary, prepared for the Economic Committee by Siegfried Tschierschky, Geneva, 1932.

[12] "Thus the Geneva negotiations ended with a modest testimonial of utility for the international cartels and a few friendly recommendations of good behaviour." "Cartels of Yesterday and To-day," in *International Cartels*, 1939, No. 2, p. 2.

[13] League of Nations; Document C.E.I.44, 1927.

[14] League of Nations, Monetary and Economic Commission: Draft Report of the Economic Commission of 20th July, 1933. *Conf. M.E.C.E.* 108, p. 2. Where agricultural products or raw materials are concerned, the Governments themselves are seen to back or even be parties to international agreements. The adequate distribution of these commodities between all countries of the world is the basis of all international economic planning. *Cf.* International Labour Office: *Inter-governmental Commodity Control Agreements* (Montreal, 1943).

[15] M. and E.C., 1933. Report of the Bureau to the Conference. Official No., *Conf. M.E. 22, p.* 18.

[16] *Ibid.*, p. 19. For the principles see pp. 26 ff.

(3) *The part the Governments are called upon to play was discussed* in the following terms: " . . . while taking most careful account of the opinion of those directly concerned, without whose sincere co-operation it is very difficult to operate schemes of this kind satisfactorily, the Governments seem called upon to consider these schemes."

"It has been pointed out that their direct intervention may even, in certain cases, be necessary, provided always that it may, and perhaps should, have a purely temporary character."[17]

When proceeding "from the laying down of principles to their practical application"[18] the Sub-Committee which took a favourable view of the principle of economic co-ordination by international cartels met considerable difficulties.

The work of the Sub-Commissions set up for Dairy Products, Sugar, Wine, Coffee, Cocoa, and Timber, Coal, Copper, Tin, brought about rather limited immediate practical results.

The *Committee for the Study of the Problem of Raw Materials* appointed by the Council of the League of Nations dealt with the Commodity Control Agreements in its Report of 1937.[19] While objecting to "the earliest regulation schemes designed solely to raise prices by intensifying or relaxing restriction on production or export of the regulated commodity in accordance with the price of that commodity at predetermined rates," it found that international schemes with the "declared object to reduce stocks to a normal level, to maintain them at that level, and to maintain a fair and equitable price for reasonably efficient producers," have, generally speaking, been an important factor in the improvement in economic conditions experienced in producing countries during the depression as well as in the development of international trade.[20]

The *United Nations Conference on Food and Agriculture* in May and June, 1943, pronounced certain principles for international commodity arrangements, among them the creation of an international organisation to study the feasibility and desirability of commodity arrangements, to initiate or review such arrangements and to guide and co-ordinate their operations in accordance with agreed principles and in close relation with international economic programmes for raising consumption levels.[20a]

The existing inter-governmental schemes on sugar,[21] coffee,[22]

[17] See also pages 26 ff.
[18] Report of the Bureau, p. 17.
[19] Series of League of Nations Publications, 1937, Vol. II, B.7.
[20] Inter-governmental Commodity Control Agreements, p. XIX.
[20a] *Ibid.*, p. XXI.
[21] While the Chadbourne Agreement of 1931, was concluded between the industries of the various adhering countries (though backed by the respective Governments and enforced by legislation) the agreement of 1937, was concluded by the Governments themselves. Its aim was to "assure consumers of an adequate supply of sugar on the world market at a reasonable price not to exceed the cost of production including a reasonable profit, of efficient producers."
[22] An Inter-American agreement was reached on 28th November, 1940, and prolonged on 12th May, 1943, for one year from 1st October, 1943.

tin,[23] rubber,[24] wheat[25] and tea,[26] show the following basic features:

(1) Effective international regulation depends on complementary national legislative or administrative measures in all important producing countries:

(2) Proper international co-ordination requires the inclusion of all important exporting and inporting countries:

(3) In the case of certain commodities price stabilisation can be achieved only by regulating production or export.[27]

"The possible range of inter-governmental control is clearly much wider than the arrangements already introduced or considered and includes many products not hitherto subject to such regulation. Among the other primary products which have been controlled internationally by producers, with varying degrees of governmental sanction or participation, may be mentioned: in the metals group, aluminium, lead, nickel and zinc; among other minerals, mercury, nitrates, petroleum, potash and sulphur, and among other products, quinine and raw silk.[28]

2. The *International Chamber of Commerce* has, "since 1933, a special committee constituted for International Ententes, which deals with the organisation and development of international cartels, their influence on production, consumption and tariff policy." "A bureau has been constituted for the collection of data with regard to actual developments in the life of cartels and also the numerous reactions of pressmen and writers to this type of international co-operation."[29]

[23] The first Tin Agreement was signed by the Governments of the Federated Malay States, Siam, Bolivia, Netherlands East Indies and Nigeria on 28th February, 1933. It was renewed for a period ending 31st December, 1933. It was prolonged in October, 1933, for the years 1934 to 1936, in 1937 for the years, 1937 to 1941, and extended on 9th September, 1942.

[24] International Rubber Agreement of 7th May, 1934.

[25] The Argentine, Australia, Canada, the United States of America and the United Kingdom adopted a provisional agreement for the immediate post-war period, in 1942.

[26] The Tea Agreement of 9th February, 1933, was replaced by the agreement of 18th November, 1936, and revised on 25th August, 1938. It is a producers' agreement with governmental representation on the International Tea Commission and the requirement of governmental approval of changes of the scheme. It is implemented by national legislation.

[27] Inter-governmental Commodity Control Agreements, p. XVII.

[28] *Ibid*, p. XVI.

[29] International Cartels, *Journal of the Bureau of International Cartels (English Version)*, 1939, No. 1, p. 1. Further publications of the I.C.C. on the subject are: *Report on International Industrial Ententes presented for information at the request of the sub-committee on international industrial ententes* by Roger Conte, Paris, 30th March, 1927. VII. *Kongress der Internationalen Handelskammer Wien*, 29.5. -3.6. 1933, in *Wirtschaftliche Nachrichten*, No. 23, Wien, 9 Juni, 1933. *Report submitted to the Monetary and Economic Conference*, June, 1933. *Organisation and Production, Document No. 5 of Paris Conference*, 1935; *International Survey of Cartel Legislation* by J. W. Reichert, Berlin. *The Organisation, Operation and Economic Results of International Industrial Ententes during recent years*, by Herman Capiau, Brussels. *The Present Situation in the Production and Marketing of Agricultural Products* by Colonel James E. Dixon, Birmingham. *International Ententes*, Document No. 4, Berlin Congress, 1937, reporting on the International Rubber Regulation Committee, the International Tin Committee, the Aluminium Cartel (Alliance Aluminium Cie.), the Steel Cartel ((Entente Internationale de l'Acier), the Tube Cartel (Cartel Continental des Tubes). *Journal of the Bureau of International Cartels* (English Version) 1939, Nos. 1 and 2.

3. The *International Law Association* has dealt with the legal problem of International Cartels in the Conferences in Warsaw in 1928, in New York in 1930, in Oxford in 1932 and in Budapest in 1934. In the last conference in Budapest in 1934, the committee was authorised to collect further data, to remain in contact with other international agencies dealing with the same subject, to prepare, if possible, a Draft International Convention and to report to a future Conference.

III

The preceding survey shows that until the outbreak of the war international cartels had not only increased in numbers and spread more and more from raw materials and agricultural products to manufactured goods, but also that the Governments themselves had taken a hand in the international co-ordination of production and marketing by cartels and had found it advisable or necessary to conclude cartel agreements with the Governments of other countries or to enforce private cartel agreements by national legislative or administrative measures. The main purpose of these organisations was the restoration of the equilibrium between production and demand which was largely disturbed or destroyed by "the distortion of international specialisation"[30] during the first world war. "International economic co-ordination will be still more out of balance after this war." "It would be highly unrealistic to base proposals . . . for freer trade upon the assumption that a competitive equilibrium can be restored and maintained between national economies merely by removing controls and allowing competition to work freely."[31]

Pre-war trade was not a system based on the principle of free competition. The "attractive picture of an intricate but integrated self-regulating structure in which not only the prices of commodities, but the costs of production—wages, interest and prices—were kept in a shifting equilibrium all over the world"[32] was distorted by restrictions of all kinds such as customs tariffs, import quotas, currency transfer regulations, clearing and barter and other means of economic warfare agreements. The freedom of international competition was restricted, if not abolished, by egotistic measures in protection of national economic interests. Neither could the natural regulating factors of supply and demand take effect, nor was there a planned direction or co-ordination of national policies by international consultation and agreement.[33]

[30] *Condliffe*, p. 10.

[31] *Ibid.*, p. 52. J. Anton de Haas *Economic Peace through Private Agreements* in Harvard Business Review, Winter No., 1944.

[32] *Ibid.*, p. 50.

[33] Cf., *Commerce entre etats*, by Eulenburg in *Revue Economique Internationale*, 1933, Vol. II, pp. 7ff; *La Concurrence Internationale*, by Henri Hauser, *ibid.*, 1937, Vol. II, pp. 7 ff; *Les Entracès au Commerce International*, by Jean Siove, *ibid.*, 1937, Vol. IV, pp. 239 ff; *Situation du Commerce Exterieur*, by Colin F. Campbell, *ibid.*, 1935, Vol. I, pp. 549 ff.; *Rapport sur la possibilite d'obtenir une reduction generale des obstacles au Commerce International*, by Van Zeeland, *ibid.*, 1938, Vol. I, pp. 350 ff.

International economy after the war is planned to be fundamentally different. It will be the aim to establish "the principle of economic co-operation as the foundation of an expanded world trade." "The maelstrom of panic and economic warfare culminating in war" will have to give way to "a world in which the members strive for a better life through mutual trust, co-operation and assistance."[34]

It seems that, with this aim in view, the question whether cartels should be abolished because of the risk of abuse of economic power to the detriment of the community as a whole does not arise. Cartels are an indispensable and integral part of economic co-ordination. Their true economic function is to replace free competition by co-ordinating and marketing, and to end economic war by combining competitors in concerted action. To aim at international co-operation and to canvass the abolition of international cartels at the same time are two aims which are incompatible with one another. International Cartels will have to play a most essential part in the field of economic planning and co-operation.[35]

In the "Resolution concerning Economic Policies for the Attainment of Social Objectives," the International Labour Conference at its twenty-sixth session, Philadelphia, April - May, 1944,[36] considers: (*a*) " . . . that the United Nations should also examine war-time changes in industrial capacity, should arrange for exchange of information on post-war industrial programmes and should take vigorous action to promote the expansion of international trade by appropriate commercial policies; and considers that all countries, creditor as well as debtor, should adapt their commercial policy in such a way as to enable them to settle all obligations arising out of international transactions; (*b*) considers that the United Nations should initiate measures to facilitate the co-ordination through appropriate international machinery of the commercial policies of all countries for the purpose of promoting a steady expansion in world trade on a multilateral basis; (*c*) considers that in such co-ordination special consideration should be given to the need of countries which are highly dependent on returns from exports to take measures to ensure a high degree of stability in the level of their economic activity and observes that the need for these measures will decrease to the extent that international collaboration proves successful."

It does not seem feasible to set up such appropriate machinery to

[34] Message of President Roosevelt to Congress on the Bretton Woods Agreement of February, 1945.

[35] "In spite of the shortcomings of past arrangements, the need for some measure of international control remains, since, if no agreement is reached, nations will not hesitate, but will be tempted, if not forced, to subsidise directly or indirectly their high-cost producers as they did for years before the present war. Failure to reach agreement on policies of stabilisation and adaption is thus likely to lead to a repetition, with new weapons as well as with old, of the policies of exaggerated economic nationalism and trade warfare of the 'thirties." (*Condliffe*, p. 102).

[36] International Labour Office: Official Bulletin, Vol. XXVI, No. 1, 1st June, 1944, pp. 92–99.

facilitate the co-ordination of the commercial policies without making use to a wide extent of international cartels.

It was shown before that it was the Governments themselves which found it necessary or advisable to adopt cartels as means of pacifying and co-ordinating the international market of Tin, Rubber, Sugar Wheat, etc. It seems that the cartels will be extended by governmental agreements to other important raw materials such as oil, or to air transport and other services of fundamental importance for the peaceful march of all nations to world prosperity.

Does that imply that the solution of the cartel problem lies in international agreements exclusively made by Governments? That private agreements are banned from the field of international economic co-operation.[37]

Before the first world war International Trade was mostly the object of agreements between Governments which directed and encouraged private enterprise by bilateral and multilateral commercial treaties. There were some private agreements between groups and associations of producers, and agreements in which Governments as well as private parties took part.

The first world war changed the structure of the international market. The growing industrialisation of the world, and the shifting of political frontiers led to a considerable increase and essential changes in the political allocation of the productive capacity of the world. The international co-ordination of production and marketing involved economic and political difficulties and problems which could be solved by the initiative, flexibility, and adaptability of private associations rather than by State direction. International Cartels became the promoters of international economic collaboration and prepared the ground for market regulation by State agreements, in particular in cases where the nature of the market requires constant adjustment to changing conditions.[38]

The question whether the State or private enterprise is to be preferred, is certainly one which different nations will answer differently, "depending upon the distribution of political power among the various economic groups. Some countries may rely wholly on State enterprise, others largely on private enterprise to provide employment for their resources of men and machinery, while in still others mixed systems of State and private enterprise may be developed."[39] "Few Governments would of their own account endeavour to assume responsibility in business matters, if the desired goal could be reached to the satisfaction of the community by private co-operation."[40]

[37] "The distinction between private and government control is perhaps not as crucial as it may appear since the government bodies regulating the various commodity markets have in fact been dominated by producers' organisations or have acted largely in the interests of the producers." (Condliffe, p. 60).

[38] *Wirksamkeit zwischenstaatlicher Kartellabkommen* by Poensgen, in *Deutscher Volkswirt*, No. 12/13 of 23–12–38, p. 556ff. *International Cartels and Commercial Treaty Policy*, in International Cartels, 1939, No. 1, p. 7.

[39] *Condliffe*, p. 98.

[40] *I.C.C., Berlin Congress*, 1937, p. 8.

But even if the States should reach agreement on the desirability of international collaboration by direct governmental action, it is most unlikely that they could establish and maintain the giant central international organisation which had to plan, direct and control international trade in all its details. A central international authority would have to confine itself to the laying down of fundamental principles of economic co-ordination. The daily initiative and execution of international collaboration had to remain a matter for trade and industry themselves under the supervision and direction of the central international economic organisation.[41]

IV

The lawyer, in search of a legal solution of the international cartel problem, will have to base his proposals on the following economic aspects:

(1) The post-war world requires "the fullest collaboration between all nations in the economic field."[42]

(2) Cartels are indispensable instruments of economic co-ordination, where they serve to restore and maintain the equilibrium between production and demand to the benefit of both, producers and consumers.

(3) The concentrated economic power of organised industrial groups, however, "if not carefully controlled, may lead nationally to a sort of industrial feudalism, and internationally to a trading system increasingly dominated by agreements between powerful national groups."[43]

To bring about efficient international co-ordination in production and marketing, it will be the task of the Governments not to abolish international cartels altogether. They must set up international machinery for the effective control of those cartels in which they do not participate directly. The control of private producer cartels must secure that their constitution and operation comply with the basic principles of inter-governmental cartels and cartels in which Governments participate.

The Governments must prevent cartels from pursuing purely egotistical policies detrimental to consumers.[44] They must also protect themselves against the overwhelming political influence of an economic oligarchy produced by the gradually increasing organisation of national and international economy.[45]

[41] "Many of the agreements have been disrupted by the war." "New Variations will no doubt make their appearance, and . . . any realistic policy of international economic reconstruction must take account of their probable reappearance." *Condliffe*, p. 56.

[42] Atlantic Charter.

[43] Condliffe, p. 58.

[44] *Condliffe*, p. 58, p. 102, cf., Oualid, *International Raw Material Cartels* (International Studies Conference, Paris, 1938), P.E.P., *Facts on International Trade*, 1943, p. 10.

[45] Koch, *International Cartels*, paper read before the Warsaw Conference of the International Law Association in 1928, p. 243 f.

It cannot be denied that there are very great difficulties to overcome in setting up a proper control of cartels, difficulties which are increased where international cartels are concerned and the sovereignty of states is in question.[46] We have, however, seen that the solution of the problem is not only a question of future national and international cartel policy. The control of cartels has become an essential part of the wider problem of international collaboration. It will be based to a large extent on inter-governmental and private cartels and the latter must be either government-sponsored or government controlled.[47]

Any scheme of international control of cartels will have to be based on the fundamental principle that every country has the sovereign right to plan, direct and control its national economy just as it thinks proper in the interest of its national community. Economic policy includes the attitude towards and the control of cartels. Every country must, therefore, be free to make its own decision whether to adhere or to reject a proposed or existing international scheme of market regulation.[48] Each State has sovereign rights over its national cartels inside and outside the area of its own territory. It has also the right to interfere with the activities of any foreign or international cartel within the sphere of its own sovereign government.

Here lies the fundamental difficulty of any efficient control of international cartels. An agreement between States on cartel policy inevitably involves the renunciation of parts of the supreme power of the State, namely that to determine the economic policy of its own country.[49]

The objects of cartels may be the regulation of production or export from the producing countries.[50] The agreement may provide for the regulation of total output by a periodically fixed production programme with quotas for the different countries, or it may confine itself to fixing export quotas on the basis of fixed uniform prices and sales conditions with or without reservation of domestic markets for the members, and to a determination of export markets with reference to the geographical position of the plants.[51] The object may be a reduction of excessive world stocks and the maintenance of a price

[46] "The supervision and control of international cartels promises to be one of the most difficult of all post-war international economic problems." *Condliffe*, p. 116.

"As regards international control of international industrial combines, the experts maintain the opinions they have already expressed on this subject in the foreword to their 'Review of the Economic Aspects of a Number of International Industrial Agreements.' (document E. 614)—namely that such a control appears economically and politically impossible." (*International Industrial Agreements*, Geneva, 1931, p. 34.)

[47] Cf. pp. 142 ff below.

[48] A proposal to introduce compulsory arbitration on the international plane in order to secure the adherence of individual national groups to an international cartel as Capian put forward in *Organization and Production* Document No. 5, of the I.C.C. Paris Congress, 1935, p. 7 ff., seems rather unrealistic.

[49] *Callmann in Kartell Rundschau*, 1934, p. 588. *Condliffe*, p. 98.

[50] International Tin Agreement; International Sugar Agreement.

[51] The Continetal Tube Cartel of 1930.

level which will be reasonably remunerative to efficient producers.[52]

Clearly the recognition and support of a private international organisation with such objects by a Government implies an obligation to adapt the national production and marketing policy in the special field of the activities of the cartel in question so as to conform to the objects of the agreed control system. A decision on this point is a sovereign economic political act of the Government concerned.[53]

The necessity to preserve the sovereign rights of every Government as far as the control of International Cartels is concerned, does not rule out such control altogether. Any scheme of control, however, will have to take this difficulty into account in order to be effective.

The control should be based upon the principle that international cartels are null and void if they are not registered with the International Cartel Board set up by the Economic Committee of the new League of Nations. The registration is dependent upon the approval of the cartel by the board.

Such approval will be given only to a cartel which can prove that its objects and its past and potential activities are within the aim of international economic co-operation, and respects certain "guiding principles."[54]

The agreements should conform generally to the principles laid down by the Economic Commission of the World Monetary and Economic Conference in 1933.[55]

They should be fair to all parties, both producers and consumers, designed to secure and maintain a fair and remunerative price level and should, as far as possible, be worked with the willing co-operation of consuming interests in importing countries. The machinery established for its administration must be workable, and the individual governments concerned must have the power and the will to enforce it in their respective territories.

In accordance with the fourth point of the Atlantic Charter they should avoid discriminatory practices. They should provide for the removal of excess capacity but not by protecting high-cost production by the restriction of low-cost production, but by progressive replacement of less efficient by more efficient productive capacity with a minimum of dislocation and social strain. They should include provisions "for the disposal of accumulated stocks and maintenance of adequate reserves, and for the regulation of prices so as to eliminate excessive fluctuations and keep prices at a level sufficient to call forth adequate supplies from the most efficient producers." They should "ensure that labour employed on the production of controlled commodities receives fair remuneration and adequate social security

[52] Preamble to the International Rubber Agreement of 7.5.34.

[53] "The real difficulties appear at the policy-making level when conflicts are likely to arise between national governments which indentify their interests exclusively with those of their domestic producers . . . and those which speak out only on behalf of their great consuming countries."—*Condliffe*, p. 103.

[54] Cf., Inter-governmental Commodity Control Agreements, p. XXIII, ff.

[55] See page 133 above.

protection and that the other conditions of employment are satisfactory."[56]

The International Cartel Board should consist of representatives of the producers, of the various classes of consumers of each country for which registration is applied for, and of a number of (at least three) permanent members who are disinterested experts and the representatives, not of any national or sectional group, but of the whole world community.[57]

"The representation of final consumers presents a problem of outstanding difficulty, since the ultimate consumer as such is notoriously poorly organised."[58] "Suitable technical experts, willing to be true international civil servants can be found[59] or at least trained.[60]

The cartel is recognised as a "good cartel" and will be registered if it is approved by a three-quarter majority of the Cartel Board. This does not imply that the cartel now has a free run and may carry out its approved objects by any means the cartel management may think proper to adopt. The registration of the cartel confirms only the validity of the cartel agreement in all countries which were represented on the Board and have not objected to its approval and registration.

The country or countries which, in exercise of their sovereign right to be the sole judge of their national economic policy, have voted against the registration, are at liberty to introduce any legal or administrative measures against the cartel in question. The cartel does not enjoy legal protection of any kind within their national areas. Members of such a cartel cannot be sued before any court, whether national or foreign, in order to enforce their obligations as cartel members if they are either resident or have to perform their obligations in the country which has objected.

[56] *Condliffe* pp. 102–3. Intergov. Com. Control Agr. pp. XXIX–XXXIV.

[57] *Condliffe*, p. 103.

[58] Intergov. Com. Control Agr., p. XXXIX. "He can be represented to some extent through governments or persons designated by them. In some cases consumers' co-operative societies may represent an important or significant proportion of the ultimate consumers. In certain cases organised labour will be qualified to express and defend the standpoint and interests of the ultimate consumers." "Given this complicated situation, it is doubtful whether any single method of nomination of the representatives of final consumers on international bodies give satisfactory results."

[59] *Condliffe*, p. 103.

[60] Past experience shows that, if the inevitable conflict between national and international loyalty arises, national allegiance is invariably put first. The desertion or neglect of the duties of an international office in favour of devotion to national interests is not even regarded as a breach of faith, but as an expression of national loyalty which, if not approved of, is generally understood and met with sympathy. It would be desirable that the new world organisation should have its own schools and colleges for the education of truly international civil servants who have the welfare of the world community at heart. "The time may come when it will be possible to erect such institutions and ensure their effectiveness by building loyalties of world citizenship. Perhaps the best way to build such loyalties is by the creation, in specific fields of common interest, of institutions with defined powers and responsibilities. The efficient working of such institutions may come to command the loyalties of individuals in ways consistent with their national allegiances, as some of the great religions now do." —(*Condliffe* p. 30.)

In order to make the control system effective the International Cartel Convention should lay down two main principles:

(1) All contracting governments undertake to take all the legislative and administrative measures necessary for the execution of the approved and registered cartel agreement. The text of such measures has to be communicated to the Cartel Board.

The national courts will have to consider the international cartel as valid in so far as its activities do not conflict with the national law on unfair competition.

(2) All contracting governments undertake to introduce national legislation which conforms to the fundamental principle of international cartel control, namely that all international cartels which are not registered with the International Cartel Board are null and void and will be liquidated, unless they are wound up within a specified period. Any acts of such unregistered cartels will be regarded as unfair competition.

The failure of a country to interfere with a cartel which, though international in the meaning of the International Cartel Convention, has not applied for or was not granted registration by the Board, should be regarded as an infringement of the Convention and dealt with accordingly.[61]

The application of a cartel for approval and registration must be accompanied by the following documents:

(1) Verified copies of all agreements, articles of association, etc., which form the basis of the cartel.

(2) A list of its members with their names, occupation and nationaltiy.

(3) Verified copies of all minutes and resolutions of the cartel or any of its organs, agents or representatives.

(4) Written statements of all verbal, tacit or secret understandings made in place of, or besides, or in addition to, or supplementing, any written agreements.

(5) A statement on the location of its registered offices or places of business and the names and addresses of all its officers.

(6) Affidavits signed by all responsible leaders or members of the cartel that the list of the documents produced is correct and exhaustive, that no other documents exist and that their contents are true and complete.

(7) Any information on organisation, business conduct, management, and relation to other associations, etc., which may be required.

The registration may be cancelled at any time either with respect to

[61] Cf. Art. 44 of the International Sugar Agreement of 1937, which provides for the prohibition or restriction of import from a country which infringes the agreement.

There must be a period of transition for existing international cartels which will have to apply for their registration within a specified period.

an individual country or countries if its or their Governments so desire or generally if, upon the application of the Government of any country concerned, the Board decides to withdraw its approval with a simple majority of votes.

All registered cartels have to make annual returns of any alterations of any document filed with the original application or produced during the application procedure or with a previous annual return, and to file copies of all minutes and resolutions recorded during the year following the application or the last return. Furthermore, they will have to furnish the Board with any further information required on their activities, business conduct, management and relation to other industrial cartels, etc.

This will provide the Board with up-to-date information relating to all the facts which formed the basis of their original decision. The Board will also be prepared to receive complaints about the abuse of the economic power of the cartel from other sources and thus be in the position to exercise a proper supervision and control of the cartel. The Board may issue special directions to the cartel whose non-observance will lead to the cancellation of the registration, or it may, without giving any direction, decide that the cartel should be struck off the register.[62]

2. It may seem premature to try to establish unified international rules defining the limits of the legitmate activities of an international cartel as distinct from unfair competition. Callmann[63] points out rightly that there is a universal code of moral principles in the field of business activities which is accepted by all civilised nations as an expression of fairness and justice. But the various national acts on economic law, dealing with unfair competition, company law etc., differ from each other in their detailed application of these principles, although they show a large measure of affinity and adaptation.[64] It would not be an entirely simple matter to create a universal code for the immediate control of the activities of international cartels. Experience with similar unification attempts before the war have shown that common principles and a fair amount of good will do not suffice to overcome the many difficulties in working out detailed uniform rules arising from national conditions and tradition. The control of cartel activities, however, need not be postponed until a uniform code has

[62] Cf. Section 5, of the U.S.A. Act of 10.1.1918 (*Webb-Pomerene Act*) and the Decrees of the German Minister of Economic Affairs of 7.7.36. (*Reichsanzeiger* No. 157–36), 29.7.36. (On Co-operation with the Organisation of the Industrial Economy), 12.11.36. (II Pr. 27258–36—IV. 33301–36); also *Instructions of the 'Economic Groups' to the Cartels*, of 20.4.37. Oualid, *The Social Effects of International Trade Agreements*, Geneva, 1926, p. 32 ff. and in "*Le Probleme des Changements Pacifiques dans les Relations Internationales,*" *Xth Session de la Conference Permanente des Hautes Etudes Internationales Paris*, 1937, published by *Institut International de Co-operation Intellectuelle, Societe des Nations*, Paris, 1938, 344 ff.

[63] "*Die Lage der Internationalen Kartelle auf der* 38. *Tagung der International Law Association in Budapest*, 1934" in Kartell-Rundschau, 1934, pp. 589 ff.

[64] See Callmann, *ibid.*, p. 586; "*Les principes qui sont a la base du droit national constituent aussi des sources du droit international.*"

been agreed upon. Until that time the control of the cartel moral can be carried out by means of individual codes.

The appropriate way is suggested by the American "National Industrial Recovery Act of 16th June, 1933, (NIRA)." Among other things the Act was intended to eliminate unfair competitive practices, to promote the fullest possible utilisation of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), and to augment the consumption of industrial and agricultural products by increasing purchasing power;

> "In order to effectuate this policy the President of the United States is authorised to establish the necessary agencies. He is also authorised upon application by one or more trade or industrial associations or groups, to approve a code or codes of fair competition for the trade or industry in question subject to the following conditions:
>
> (1) That such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof;
>
> (2) That such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.
>
> The President may further, as a condition of his approval of such codes impose conditions for the protection of consumers, competitors, employees and others, and in furtherance of the public interest."

The Cartel Board would at the time of registration of a cartel approve of and impose a certain code of rules, proposed by the cartel itself or fixed by the Board. The rules of the code would define the limits of the legitimate business activities of the cartel and determine what has to be regarded as unfair competitive practice. The Governments which adhere to the Code will have to promulgate the necessary national acts to enforce it. Infringements of the code may lead to the cancellation of the international registration of the cartel and thereby to its invalidity and liquidation.

In the course of time, these codes together with the jurisdiction of national and international civil and criminal courts and courts of arbitration such as the International Chamber of Commerce, International Law Association, etc., will lead to a unification of the law against unfair competition by International cartels and thus pave the way to a unified universal code by International Convention. The control of cartels will not have to wait until such international law has been established. It will help to create this law gradually as the outcome of specialised practical experience.[65]

3. The institution of a scheme of supervision and control alone,

[65] Benjamin G. Wallace and Lynn R. Edminster suggest an "International Trade Commission," as a parallel to the American Federal Trade Commission, to adjudicate conflicts of opinion as to what constitute fair practices in international commerce. They visualise a Commercial Division of the Permanent Court of International Justice. (*Intergov. Com. Control Agr.* p. LIII).

however, cannot fully achieve the purpose of making cartels instruments of international collaboration. Co-operation in production and marketing may in certain cases require more far-reaching measures by the Governments if private initiative does not suffice to create the necessary economic organisation or individual economic activity is undesirable. During the London Conference in 1933, it was the delegate of the U.S.S.R. who made the reservation that the timber control arrangement was dependent upon the formation of special export organisations in the other countries concerned. "Failing this the U.S.S.R. would not be in a position of equality as the monopoly of foreign trade exercised by his Government was a guarantee of the fulfilment of any such provisions as far as the U.S.S.R. was concerned."[66]

In such or similar cases the countries in question will agree on special national legal or administrative measures to the effect of forming sponsored or compulsory national cartels.[67] There may be cases where international cartels are required in order to combine individual economic activities into concerted private action under governmental control. It will be up to the Governments concerned to form such cartels either between themselves by way of agreement, as in the case of the Sugar, Rubber, Tin, or Wheat Cartels, or again by forming national compulsory cartels whose object is the formation of an international cartel for co-operation in production and marketing of the commodities in question. The articles of association of such compulsory national or international cartels and their control by the Cartel Board would ensure that they act as instruments of international economic collaboration.

V

The time for an international unification of the private legal foundations of international cartels has not yet come. The Cartel, as mentioned before, is not a special legal form as the company or corporation, but an economic definition. Cartels make use of that special legal form offered by the national law of its country which best suits its material interests. It may be an innominate contract or a company under civil law, or a corporation with legal entity, or it may choose among several types of unions or associations.

In view of the wide variety of national forms it is impossible to try to unify the legal form of national or international cartels. It has so far not even been possible to agree upon a legal form for international companies. It seems useless to unify the legal form of cartels as long as that form may neither agree with the national legal forms of the countries concerned nor with the material interests of the cartel in these countries.[68]

[66] *Journal of the Conference*, p. 141.

[67] Cf. German Law on Compulsory Cartels of 15.7.33. (*Reichsgezetzblatt I*, p. 488).

[68] *Callmann, ibid.*, p. 588, refers to the tax question. He thinks it impossible to unify the cartel form as long as there is no uniform national tax law.

But the realisation that it is at present impossible to solve the public and private legal cartel problems comprehensively by an International Cartel Convention does not exclude the attempt to give an immediate uniform national answer to a number of private legal questions arising from the existence and the activities of international cartels. On the contrary, in the interest of better economic collaboration, it seems highly important to settle these points without waiting for the more comprehensive solution of the private legal problems of international cartels.[69]

The *Legal Status* of the international cartel, i.e. the question what national law governs the cartel and its relations with its members should find a uniform answer, as it is most essential that there should be a uniform law within one and the same cartel. The status should be determined by the "seat" of the cartel, i.e. the seat of its administration or the national economic centre of gravity. If such a seat does not exist, or if the cartel has no centre of gravity and the seat of administration is in a country which is quite detached from the economic purpose and activities of the cartel, the Convention should provide for other criteria to determine the legal status of the cartel and its relations to its members (actual or presumed intention of the parties, place of fulfilment, conclusion of contract etc.).

The national law that governs the cartel determines its *legal qualification*, i.e. its legal nature.

A convention on these points would offer uniform principles for the determination of the law applicable to cartels no matter what legal forms ("higher" or "lower") they have adopted.

The problem of *nationality* arises only for cartels which are corporations with legal entity. The cartel should be a national of the state which was competent to grant, and granted it, its legal personality. This will, as a rule, be the state of the seat of the cartel.[70]

One other important question which should be solved by International Law is that of the *Legal Status and Character of the Control Authorities* of International Cartels such as "Buffer Stock" Authorities, the International Tin Committee, the International Rubber Regulation Committee, the Sugar Council, etc.

The functions of these control authorities cover a wide ground. They fix quotas for the various countries concerned and have the power to make recommendations which may result in far-reaching material actions. They are also entrusted with the power "and responsibility of commercial transactions of considerable magnitude in connection with the disposal or handling before disposal of stocks."[71] It is highly

[69] *Frankenstein, Internationales Privatrecht (Grenzrecht)* Vol II., p. 341 ff. Koch *International Cartels*, paper read before the Warsaw Conference of the I.L.A., 1928, Report p. 335 ff; *Callmann ibid., Aubin, "Internationale Kartelle im Internationalen Privatrecht," Kartell Rundschau*, 1940, pp. 33 ff., 65 ff.; *Hofheinz Die Kartellbindung bei Internationalen Kartellen*, Heidelberg, 1939. Martin Wolff, *Private International Law*, paras. 283–291

[70] *Callmann, ibid.*, p. 586, Niemeyer, in "Verhandlungen der Internationalen Vereinigung für vergleichende Rechtswissenschaft," 1911.

[71] Intergov. Com. Control Agr. p. LV.

desirable in the interest of the cartel itself, in the interest of its members and of third parties that the legal status and character of these international cartel organs will be clearly defined by international law. Their disputes with private parties should be settled by a special international court of law or abitration.[72]

It should not prove too difficult to find uniform answers to a number of other questions as:

> Effect of prohibition of the cartel in one country upon its validity in others,
>
> Binding character of cartels which are against the public policy of one individual country,
>
> Effect of termination by one member or invalidity of the cartel in one country upon the obligations of other members.
>
> Effect of the adoption by a cartel of some legal form which is prohibited by the law of certain countries,[73]

and to include the rules in the Convention.

VI

An International Cartel Convention drafted along the lines indicated here, though by no means complete, would serve the purpose of introducing an effective control of international cartels without infringing upon the sovereign rights of the States to determine their national economic policy. It would also clarify certain private legal foundations of international cartels. The Convention would thus further the aim of bringing about the fullest collaboration between all nations in the economic field and would help to convert cartels into valuable instruments for the post-war reconstruction of the world.

F. E. Koch

[72] *Ibid.*, p. LVI.

[73] See English Trade Union Act, which forbids cartels to adopt the legal form of companies, friendly societies and other associations with legal entity, cf. Koch *Grundzuege des. engl. Kartellrechts*, Berlin, 1927, pp. 11 ff.

THE REVIVAL OF A MATRIMONIAL OFFENCE BY SUBSEQUENT MISCONDUCT

Introduction.

Is desertion for a period of less than three years, which is not of itself a ground for divorce or judicial separation,[1] sufficient to make a condoned matrimonial offence which is a ground for divorce the foundation of successful divorce proceedings? This question, which had recently been the occasion of conflicting decisions by Pilcher, J., and Barnard, J., in the respective cases of *Higgins* v. *Higgins and Banister*,[2] and *Ainley* v. *Ainley*,[3] appears to be of sufficient sociological and legal interest to justify re-examination of the doctrine of the revival of a condoned matrimonial offence by subsequent misconduct.[4]

In the first case mentioned above the petitioner was the husband, who proved adultery in July, 1941, against his wife, which he condoned in August, 1941. During this month she deserted him and he succeeded on a petition presented to the court in November 1941 in which no further adultery was alleged against his wife. In the second case the unsuccessful petitioner was the wife; the cohabitation following her condonation of her husband's adultery was for a considerably longer period, as was her husband's subsequent desertion. The latter, however, had not endured for the three years immediately preceding the presentation of the petition, which is requisite for an independent ground for divorce,[5] and, from the point of view of the principle involved in the question put above, factual differences between the two cases can be ignored.

For the sociologist interested in family law, that question is important, because it involves the relative position of spouses after a matrimonial offence which is a ground for divorce has been forgiven, without anything in the nature of an undertaking not to rely upon it in any future proceedings such as that involved in the case of *Rose* v. *Rose*.[6] This is more often to be found in separation deeds than as a a term of reconciliation with which this article is primarily concerned. Are they to be treated for all purposes as being in the same position as they were in when they started at marriage? or should the law applicable to spouses in general be modified in their particular case? The objection to this method of approach, which might be based on the view that when the court gives relief on the ground of a matrimonial offence which has been condoned and revived by subsequent

[1] Judicature Act 1925, Section 176, Section 185; Matrimonial Causes Act, 1937, Section 2, Section 5.

[2] *Higgins* v. *Higgins and Banister* (1943) P. 58.

[3] *Ainley* v. *Ainley* (1945) 61 T.L.R. 201. The case of *Beard* v. *Beard* (1945), 61 T.L.R. 356, in which Hodson, J., followed *Ainley* v. *Ainley* in preference to *Higgins* v. *Higgins and Banister*, was decided after this paper was in proof.

[4] In the view of Barnard, J., the use of the term "matrimonial offence" in this context has led to confusion (61 T.L.R. 201). The term is therefore avoided so far as the acts relied on as bringing the doctrine of revival into operation are concerned.

[5] Judicature Act, 1925, Section 176; Matrimonial Causes Act, 1937, Section 2.

[6] *Rose* v. *Rose* 7 P.D. 225; 8 P.D. 98.

misconduct, its decree is really founded on the first offence, would be out of place in this context. The substance of the matter is that if the acts relied on as reviving the offence are not of themselves grounds for the relief granted, the general law is being departed from in a particular case.[7]

From the point of view of the lawyer the opening question is important because it involves the further question of the practical effect of the Matrimonial Causes Act, 1937, on the doctrine of the revival of a condoned matrimonial offence by subsequent misconduct, which is derived from decisions and dicta in the Ecclesiastical Courts. It will be remembered that the Act, as well as making desertion for three years immediately preceding the presentation of the petition, cruelty, and incurable unsoundness of mind coupled with detention under continuous care and treatment for five years, grounds for divorce additional to the existing ones of adultery, and the rape, sodomy or bestiality of the husband,[8] changed the law by assimilating the grounds of and bars of divorce and judicial separation, apart from leaving non-compliance with a decree for restitution of conjugal rights as a ground for the latter alone.[9]

In the days before 1858,[10] when adultery or cruelty were the only grounds of divorce *a mensa et thoro* which, apart from a decree for restitution of conjugal rights, was the only principal relief which could be obtained from the courts by a spouse aggrieved by the conduct of his consort, it was practically relevant to know whether acts of unkindness, short of the extremely grave conduct which appears to have been necessary to support a petition for divorce *a mensa et thoro* founded on cruelty,[11] or acts of familiarity short of adultery, would revive condoned cruelty or adultery. A fortiori, between 1857 and 1923,[12] when a husband could obtain a divorce *a vinculo* on the ground of his wife's adultery, but the wife could only do likewise, in the ordinary case, on the ground of her husband's adultery coupled with cruelty or desertion without excuse for two years, which latter were, in addition to adultery, grounds for judicial separation,[13] there was obvious scope for the operation of the doctrine of revival. It will be seen later that this was enhanced by the provisions of the Matrimonial Causes Act, 1884, which made non-compliance with a decree for restitution of conjugal rights the equivalent to desertion and an immediate ground for judicial separation,[14] and, between 1923 and 1937 the question as to what would operate as a

[7] *Collins* v. *Collins*, 9 A.C. 205 at p. 242 (Citation from Lord Young approved by Lord Blackburn).

[8] Matrimonial Causes Act, 1937, Section 2.

[9] *Ibid*, Section 5.

[10] The Matrimonial Causes Act, 1857, came into force on 1st January, 1858.

[11] *Durant* v. *Durant* (1825), 1 Hagg. Ecc. 733. *D'Aguilar* v. *D'Aguilar* (1794), 1 Hagg. Ecc. 773.

[12] The Matrimonial Causes Act, 1923, made adultery alone in all cases sufficient for the wife as from the 17th July of that year.

[13] Matrimonial Causes Act, 1857, Section 27, Section 16.

[14] Matrimonial Causes Act, 1884, Section 5.

revival of condoned adultery might still be of the greatest practical significance.

The present position raises difficult questions, for, it will doubtless have been observed, before 1858 the doctrine could only have been of much practical significance if conduct short of cruelty or adultery would render the latter available as a ground for divorce a *mensa et thoro*. To quote from Sir John Nichol,[15] "If nothing but clear proof of actual adultery will do away with condonation of adultery, the rule of revival becomes nearly useless, for the revival is unnecessary." The remark would, of course, have applied equally to the case of the revival of cruelty which had been condoned. On the other hand, between 1857 and 1937 even if, in order to revive condoned adultery, a matrimonial offence which was itself a ground for judicial separation, had to be proved, the doctrine could be of the utmost practical importance to one seeking dissolution of marriage for which proof of adultery was normally essential. Now, however, that, with the one exception of non-compliance with a decree for restitution of conjugal rights, the grounds for judicial separation and divorce are identical, the rule of revival will again have become "nearly useless" if it is only brought into operation by conduct which is an independent ground of divorce or judicial separation. There do not appear to have been any reported decisions since 1937, or indeed since the repeal of the Matrimonial Causes Act, 1884, by the Judicature Act 1925,[16] dealing with the effect of non-compliance with a restitution decree upon a condoned matrimonial offence, and discussion of the problem is best deferred until the cases mentioned at the beginning of this article have been considered in the light of the history of the doctrine of revival.

The Position Before 1858.

The question of the scope of the doctrine before the coming into force of the Matrimonial Causes Act, 1857 may be considered in the light of the following five propositions which can be extracted from the judgment of Sir John Nichol in the case of *Durant* v. *Durant*[17]:—

(1) Condonation was accompanied by an implied condition.

(2) The condition implied was that the injury should not be repeated.

(3) Repetition at least of the same injury did away with condonation and revived the former injury.

(4) Cruelty would revive adultery.

(5) Less was necessary to revive a condoned offence than to found an original sentence of divorce *a mensa et thoro*.

The first three propositions appear to have been conceded as early as 1730 and the case of *Worsley* v. *Worsley*,[18] decided in that year, is sufficient to support the fourth.

[15] 1 Hagg. Ecc. 761.
[16] Judicature Act, 1925, 6th Schedule.
[17] 1 Hagg. Ecc. 733 at 761 and 765.
[18] *Worsley* v. *Worsley* (1730) 2 Lee 572.

All of the first four of the above propositions represent the present law and do not call for discussion here. The fifth, however, was the cause of debate before 1858, and its accuracy, so far as the present law is concerned, is of course in issue in the recent conflicting decisions to which reference has already been made. It has the support of dicta of Lord Stowell as well as of Sir John Nichol. The former stated in *D'Aguilar* v. *D'Aguilar*,[19] that much less was required to destroy condonation than to found an original suit, and his view was echoed in 1863 by Lord Penzance in the case of *Cooke* v. *Cooke*.[20]

Although it is clear that Sir John Nichol contemplated the possibility of the revival of adultery by some lesser offence *eiusdem generis*, or even by malicious desertion which was not then a ground for divorce *a mensa et thoro*, the facts of the above cases lend some support to the suggestion that the dicta therein should be confined to the case of the revival of cruelty which, but for condonation, would have been sufficient to support a sentence of divorce *a mensa et thoro* by harsh acts which would not come within that category. At any rate, this was the view acted upon by Sir John Dodson in *Hart* v. *Hart*,[21] when he held that malicious desertion did not revive cruelty which had been condoned.

Even within these limits, however, the doctrine of revival could have had important effects when cruelty and adultery had to be most strictly proved. Moreover, it is pertinent to remember that at the time it was thought to be the duty of a spouse, who had been deserted or merely treated with unkindness, to fulfil the spiritual law by invoking its aid in securing the return of his erring consort by petitioning for restitution of conjugal rights. Hence, as late as 1857, a limitation in a will to become effective on a wife's leaving a husband through any fault of hers, was held invalid simply because it might militate against such action by the husband, in the event of his wife's capriciously deserting him.[22] Similar considerations doubtless led the Privy Council to hold in *Wilson* v. *Wilson*[23] that cohabitation brought about by the husband's compliance with a restitution decree did not prove condonation of his previous cruelty. The provision in the Act of 1857 making desertion for the first time a matrimonial offence has undoubtedly had important effects, not the least of which is some change of opinion as to the attitude to be adopted by a deserted or ill-used spouse. However, it rendered condonation a less onerous

[19] 1 Hagg. Ecc. 773 at p. 782.
[20] *Cooke* v. *Cooke*, 3 Sw. and Tr. 126 at p. 137.
[21] *Hart* v. *Hart* (1855) 2 Sp. Ecc. and Ad. 193 at p. 200.
[22] *H.* v. *W.* 3 K. and J. 382. Contrast *Re Hope Johnson* (1904) 1 Ch. 470. For the same view in modern guise reference may be made to the judgment of Symonds, J., as he then was, in *Re Caborne* (1943) Ch. 224, especially at p. 229: "Whether the matter be looked at from the religious or civil aspect, the positive duty of reconciliation and the danger of a provision which tends to encourage departure from this difficult path are equally obvious." It is submitted, however, that profound changes of view on these matters are reflected in the speeches of the majority of the House of Lords in *Fender* v. *Mildmay* (1938) A.C. 1.
[23] 6 Moo. P.C. 484.

undertaking than theretofore so far as the forgiving party was concerned. A further reason why the doctrine of revival by acts of harshness short of cruelty has not developed is doubtless the mitigation of the stringent requirements as to proof of cruelty.[24] Another, which applies with equal force to adultery, is to be found in alterations in the law of evidence.

The Position between 1857 and 1938.

An argument was rejected in *Dent* v. *Dent*,[25] that the effect of Section 30 of the Matrimonial Causes Act, 1857, which provided that, if satisfied that adultery had been condoned, the Court was to dismiss the petition, was to abolish the doctrine of revival. This was because the effect of the doctrine is to place the parties in the same position as they would have been in had there been no condonation at all. This brings out clearly clearly the inherent fiction, but during a period in which dissolution of marriage was only possible on the ground of adultery at least, and, in the case of a wife petitioner, something more,[26] it would at least have been possible to make out a strong case on sociological grounds for the utility of the fiction in mitigating the rigours of the law.[27]

In *Palmer* v. *Palmer*[28] it was laid down in terms that the subsequent offence must itself have been the ground of a divorce *a mensa et thoro*, and, with isolated exceptions,[28a] the subsequent cases on the doctrine of revival are simply logical applications of this principle. Thus, cruelty was held to revive adultery,[29] adultery to revive desertion,[30] and desertion to revive adultery.[31] In the two last mentioned cases the desertion was for two years, and this was, of course, at the time, an essential ingredient in the case for divorce of a petitioning wife whose husband had been guilty of adultery but not of cruelty and where there had been

[24] See, for example, *Horton* v. *Horton* (1940) P. 187.

[25] *Dent* v. *Dent*, 4 Sw. and Tr. 105 at p. 108.

[26] Matrimonial Causes Act, 1857, Section 27.

[27] The fiction consists, not so much in the implication of a condition as to what is to happen in the event of a repetition of the misconduct, as in the foundation of the divorce decree on the prior and not the subsequent misconduct. It is "historic" within the classification of Gray, *The Nature and Source of Law*, Second Edition p. 30, but it is of a type which may be worthy of further analysis from the point of view of general jurisprudence. An analogous example is the treatment before the coming into force of the Limitation Act, 1939, of the effect of a promise to pay a statute barred debt so far as the doctrine of consideration is concerned. *Spencer* v. *Hemerde* (1922) 2 A.C. 507.

[28] *Palmer* v. *Palmer*, 2 Sw. and Tr. 61 at p. 62. The remark is strictly *obiter* and reference is later made to "any other marital offence which falls within the cognisance of a matrimonial court." The latter need not necessarily have been a ground for divorce *a mensa et thoro*. See the remarks in a somewhat different context of the President in *Jordan* v. *Jordan* (1939) P. 239 at p. 251.: "It is clear from the Act of 1857 itself that the offence of desertion was from the first regarded as existing independently of the period of its duration, for by Section 21, a wife deserted by her husband may obtain protection of her property at any time after such desertion."

[28a] *Ridgway* v. *Ridgway*, 29, W.R., 612.

[29] *Dent* v. *Dent*, supra; *Moore* v. *Moore* (1892) P. 382.

[30] *Blandford* v. *Blandford*, 8 P.D. 19.

[31] *Houghton* v. *Houghton*, (1903) P. 150; *Copsey* v. *Copsey* (1905), P. 94.

no restitution decree. This was not the case so far as a husband petitioner was concerned, but there does not appear to have been a reported case prior to *Higgins* v. *Higgins and Banister*[32] in which desertion for a period of less than that required for the purposes of divorce or judicial separation was relied on as conduct reviving a condoned matrimonial offence.

Non-compliance with a decree for restitution of conjugal rights is on a somewhat different basis because it constituted statutory desertion between 1884 and 1925 and has, since 1884, been a ground for judicial separation.[33] Section 5 of the Matrimonial Causes Act, 1884, expressly enabled a wife whose husband had been guilty of adultery to establish her case for divorce on this ground coupled with non-compliance with a restitution decree.[34] Where there was such non-compliance it was not necessary to prove desertion for any particular period and this became in such cases up to 1923 a common method by which an aggrieved wife obtained her divorce.

In the case of *Price* v. *Price*[35] it was held that non-compliance with a restitution decree revived condoned adultery so as to render the latter a ground for divorce because it was statutory desertion and a ground for judicial separation, and, in *Higgins* v. *Higgins and Banister*,[36] Pilcher, J., said, "It has been held in a number of cases that condoned adultery will be revived by . . . failure to comply with an order for restitution of conjugal rights which constitutes the matrimonial offence of desertion." It is also to be observed that Barnard, J., in his judgment in *Ainley* v. *Ainley*[37] appears to contemplate the revival of a matrimonial offence which is a ground for divorce by one which is a ground for divorce or judicial separation. If this is so, he can only have had in mind in including the latter, non-compliance with a decree for restitution of conjugal rights which is, under the present law, the only ground for judicial separation which is not also a ground for divorce. At a later stage in his judgment, however, he stresses the concluding words in the following passage from Lord Simon's speech in the case of *Henderson* v. *Henderson*[38]:—"It is, of course, quite true that condonation is subject to one implied condition, but that is the condition that, if the spouse who has been forgiven past matrimonial offences, is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as a *further ground for divorce.*"

[32] Supra.

[33] Matrimonial Causes Act, 1884, Section 5. Not re-enacted verbatim by Judicature Act, 1925, Section 85, as amended by Matrimonial Causes Act, 1937, Section 5. The omission of the words making non-compliance with a decree desertion, may be important, but this does not appear to be the current view. See dictum of Pilcher, J., in *Higgins* v. *Higgins and Banister* (1943) P. 58 at p. 60 cited infra.

[34] *Bigwood* v. *Bigwood*, 13 P.D. 89.

[35] (1911) P. 201. See also *Payne* v. *Payne* (1903) P. 263. (Desertion by non-compliance with a restitution decree revived by adultery).

[36] 1943 P. 58 at p. 60.

[37] 61 T.L.R. 201.

[38] (1944) A.C. 49 at p. 54. The writer's italics.

THE PRESENT POSITION.

Although the decision of Pilcher, J.,[39] was founded on a dictum of Lord Merriman in *Jordan* v. *Jordan*[40] to the effect that desertion independently of its duration is a matrimonial offence, it will be seen that it is substantially in accord with the views expressed by Lord Stowell and Sir John Nichol.[41] The decision of Barnard, J., was founded on the more recent dictum in *Palmer* v. *Palmer*,[42] and the fact that in *Copsey* v. *Copsey*,[43] a case of a husband's petition for divorce, two years desertion and no less was relied on as reviving condoned adultery. In the absence of any *ad hoc* authority it is legitimate to enquire into the present justification for the doctrine of the revival of a condoned matrimonial offence by subsequent misconduct.

The objection to it voiced as long ago as 1884 by Lord Blackburn,[44] that after condonation the status of the couple ought to be the same as, and not more precarious than, if there had been "a new marriage entered into" can be raised with greater force to-day that it was then. This is because the grounds for divorce have been extended,[45] and, to adapt a quotation from Sir John Nichol,[46] a spouse who now condones the other party's adultery is not saying: "You may treat me with every degree of insult and harshness or with actual cruelty and I bar myself from the possibility of divorcing you for your profligate adultery." Cruelty and desertion for three years will, if necessary, found divorce proceedings.

Many may think the period for which desertion has to endure in order to be a ground for divorce too long, but few will deny the desirability of a *locus penetentiae* in the case of the deserting spouse, the possible exclusion or foreshortening of which was Barnard, J.'s, objection to the effect of the decision in *Higgins* v. *Higgins and Banister*.[47] In short, in days in which divorce is relatively a much easier matter than heretofore, there is less justification for a doctrine under which, whatever the legal fiction may be, the fact of the matter is that divorce is being granted for something which would not be available as a ground for divorce by a spouse who has not condoned a matrimonial offence which is such a ground. Nevertheless, it may be noted in passing that the prospect of different couples in the community living under different divorce laws did not deter the legislature from passing the Matrimonial Causes (War Marriages) Act, 1944, under which the three years' bar on divorce proceedings imposed by Section 1 of the Act of 1937, does not apply to suits brought under the Act.

[39] (1943) P. 58 at p. 60. *Higgins* v. *Higgins and Banister*.
[40] See note 28 ante.
[41] Supra.
[42] Supra.
[43] Note 31 ante.
[44] *Collins* v. *Collins*, 9 A.C. 205 at 234.
[45] Matrimonial Causes Act, 1937, Section 2.
[46] 1 Hagg. Ecc. 761 *et seq.*
[47] Supra. It is to be noted, however, that Pilcher J. speaks (1943) P. 61, of the respondent's continuing to remain in desertion until the date of the hearing, whereas, according to Barnard, J. (61 T.L.R. 201) the petition forestalls repentance. See also 61 T.L.R. *per* Hodson, J.

There is undeniably another side to the picture for, to quote from Lord Wright,[48] "The law would undoubtedly favour reconciliation if there were any prospect of it," and there are instances in which, in the interests of reconciliation, the law applicable to spouses in general is modified. Thus, those who have been separated are allowed on their coming together to provide for the contingency of their future separation[49] which is, of course, not permitted in the case of spouses who have been together all the time.[50] The justification for this distinction is to be found in the judgment of Palles, C. B., in the case of *McMahon* v. *McMahon*[51] which is the foundation of the English decisions. In addition to the desirability of promoting a reconciliation, which is stressed by him, he expresses the view that spouses who have been apart are not in the same relative position as they were in when they started at marriage.

It was pointed out at the beginning of this article that this is the fundamental sociological question underlying the recent conflicting decisions. Yet the lawyer must remember that English law is committed to the view that whatever the position may be so far as the possibility of a future separation following upon a reconciliation is concerned, there cannot be such a thing as contingent condonation by agreement.[52] It is likewise committeed to the view that the public have an interest in the matter of divorce,[53] and in these circumstances it is submitted that it is illogical to extend the implied condition underlying the doctrine of revival beyond the commission of a matrimonial offence which is a ground for divorce under the modern law. The social utility of the inherent fiction having largely disappeared, there is no obvious reason why the law should imply conditions to condonation which, so far as rendering the condoned offence available as a ground for divorce is concerned, cannot be attached by express agreement. However desirable the reconciliation of differing spouses may be from a social point of view, it does not follow that, because on such reconciliation provision can even be made for the contingency of future divorce,[54] that remedy should be available on the occurrence of events which would not render it available in the case of spouses one of whom had not previously committed a matrimonial offence which would legally justify its adoption.

There is, however, no doubt that the case of *Price* v. *Price*[55] supports the view that non-compliance with a petition for restitution of conjugal rights is a matrimonial offence sufficient to make conduct which is a ground for divorce but which has been condoned the basis of successful

[48] *Fender* v. *Mildmay* (1938), A.C. 1 at p. 50.
[49] *McMahon* v. *McMahon* (1913), 1 I.R. 428; *Re* Meyrick's Settlement (1921), 1 Ch. 311; *Luri* v. *Luri* (1938) 3 All E.R. 156. See also (1938) A.C. at p. 44.
[50] *Westmeath* v. *Salisbury*, 5 Bli. N.S. 339.
[51] (1913) 1 I.R. 428 at p. 444.
[52] *Henderson* v. *Henderson* (1944) A.C. 49 at p. 52.
[53] One example is provided by the case of *Winter* v. *Winter* (1942) P. 151.
[54] The deeds in *Re* Meyrick's Settlement and *Luri* v. *Luri*, *ante* note 49, each provided for the contingency of divorce proceedings.
[55] *Ante* note 35.

divorce proceedings. The objection that it is no longer statutory desertion, though still a ground for judicial separation, may seem unsubstantial[56] and the point that most petitions for restitution of conjugal rights are presented through financial motives[57] is perhaps not one that the Court can take in this context. Nevertheless, there is a serious objection arising out of such decisions as those in *Phillips* v. *Phillips*[58] and *Williams* v. *Williams*[59] to the effect that in an undefended restitution suit the Court will not set up a separation agreement as a bar to the proceedings because no particular public interest would be served by its doing so. However, assuming that the agreement has been observed by the other party, the voluntary separation by agreement should not be converted into desertion by unilateral action.[60] Nevertheless, in such circumstances it is possible to imagine cases in which, if non-compliance with a restitution decree does bring the doctrine of revival into operation, the subsequent matrimonial offence would be, to say the least of it, of a technical nature. This is without any disrespect to the court which might pronounce the decree. Agreements for an immediate separation have been treated as legal for the last eighty years,[61] they may be set up by the respondent as a bar to restitution proceedings[62] and where they have been freely entered into and observed, desertion cannot exist.[63] It is therefore legitimate to ask why, if a restitution decree has been pronounced, even in the absence of the respondent, in a case in which an operative separation agreement is in existence, non-compliance with the decree should revive conduct which is a ground for divorce but which has been condoned. Consistency with the decided cases[64] on restitution petitions appears to demand that non-compliance with a decree made on such a petition should be held not to revive a condoned matrimonial offence so as to render it a ground for divorce.

[56] See note 33 ante.

[57] This was the view of Sir James Hannen, who had never known an instance in which it appeared to him that a restitution suit was instituted for any other purpose than the making of a financial demand. *Marshall* v. *Marshall*, 5 P.D. 19 at p. 23. The whole question of the bona fides of a petitioner in a restitution suit and as to what exactly is required in this context, is a very delicate one. See cases collected in *Rayden on Divorce*, fourth edition, p. 79, note (e). The main function of a restitution petition under the modern law is that it enables a wife who has been deserted for less than three years to bring the financial jurisdiction of the High Court into operation.

[58] (1917) P. 90.

[59] (1921) P. 131. For the contrary view see *Kennedy* v. *Kennedy* (1907) P. 49. A separation agreement can be relied on in a defended suit: *Walter* v. *Walter* (1921) P. 301. It must be disclosed in, and may be a bar to, divorce proceedings though undefended. Contrast *Watson* v. *Watson* (1938) P. 258, with the cases cited in notes 58 and 59.

[60] In *Pardy* v. *Pardy* (1939) P. 288, which is perhaps the strongest case on the conversion of a voluntary separation by agreement into desertion without resumption of cohabitation, the repudiation of the separation agreement by the respondent was treated as an essential condition.

[61] *Hunt* v. *Hunt* (1862) 2 de Ge. F. and J. 221.

[62] *Walter* v. *Walter*, ante note 59.

[63] There are, of course, enumerable authorities on this point, a strong one is *Long* v. *Long* (1940) 4 All E.R. at p. 230.

[64] See cases cited notes 58 to 60 ante.

No mention has been made in this article of circumstances in which, for practical reasons relating to evidence, the discretion of the court, or costs, it may be desirable under the present law to allege the revival of condoned adultery even where there is a subsequent ground for divorce. The fiction, if there would be one in such cases, would be of no general social significance. The facts giving rise to the doctrine of revival under the modern law are not likely to be of frequent occurrence in actual cases because of the likelihood of their being accompanied by conduct which is, or may become, through the efflux of time, a ground for divorce. It will, however, be interesting to see whether *Higgins* v. *Higgins and Banister*[65] means the revival of a fiction which some may have thought to be dead, or whether *Ainley* v. *Ainley*[66] is another nail in its coffin.

RUPERT CROSS

[65] Supra.
[66] Supra.

NOTES OF CASES

Spiritualism and the Law

(1) *The Witchcraft Act* (1735): 9 *Geo.* 2 *Cap.* 5

The recent conviction of Helen Duncan under this Act, and perhaps even more the judgment of the Court of Appeal, have caused no little uneasiness to those who are interested in civil liberties and particularly religious freedom.

Mrs. Duncan who is a resident of Edinburgh, is what is known as a physical medium, that is, it is claimed that under certain conditions in her presence the spirits of deceased persons appear with materialised bodies (sometimes clad as during life on earth), which are recognised and speak in their own voices to their relatives and friends. One of these conditions is that all light should be shut out of the room except a dull red light similar to but rather better than that used in a dark room for developing photographic plates and films. The medium after being stripped and searched by a committee of women is dressed in a special suit, brought into the room and placed in a wooden chair behind curtains. The figures then appear between the curtains and sometimes come out clear and talk to their friends.

On 17th January, 1944, such a séance was in progress at Portsmouth in the house of a retail chemist named Homer, when by arrangement with the police a war reserve policeman named Cross dived at the figure then appearing and claimed that he found Mrs. Duncan in his grasp and that a white shroud with which she was covered was torn from his grasp and disappeared. Detective Inspector Ford appeared on the scene by arrangement and arrested Mrs. Duncan, but in spite of appeals refused to have her or those present searched for the white sheet. Mrs. Duncan was taken into custody, bail being refused. She was charged before the magistrates under Sect. 4 of the Vagrancy Act, 1824, which reads:

> "Every person pretending or professing to tell fortunes or using any subtle craft, means or device, by palmistry or otherwise to

deceive and impose on any of His Majesty's subjects . . . shall be deemed a rogue and a vagabond within the true intent and meaning of this Act."

At the first hearing Mrs. Duncan was remanded in custody, but at the adjourned hearing five days later she was represented by Counsel and released on bail. It was announced that the case was being reported to the Director of Public Prosecutions, and at the next hearing the Director had taken over the proceedings and a charge of conspiracy was added against Mrs. Duncan, Mr. and Mrs. Homer and a Mrs. Brown who had come from the north with Mrs. Duncan. She and the other accused were committed for trial to the Old Bailey. At that trial which took place before the Recorder, Sir Gerald Dodson, and a common jury the charge was changed again to one under the Witchcraft Act, 1735.

The main object of this Act was, in an age that no longer believed in witchcraft or magic, to repeal all previous acts imposing penalties on witches and the like. It stated that after 24th June, 1735, "No prosecution, suit or proceedings shall be commenced or carried on against any person or persons for witchcraft, sorcery, inchantment or conjuration, or for charging another with any such offence." The foundation of the act is that these things including "conjuration," whatever its meaning may be, are not real or possible acts but that anyone who pretends to such powers shall be punished. Anyone who "may pretend to exercise or use any kind of witchcraft, sorcery or conjuration" is liable to a year's imprisonment. As Mrs. Duncan was eventually tried and convicted under this act only, the other charges against her may be ignored.

The charge at the Old Bailey then was that the accused had pretended "to exercise or use a kind of conjuration, that through the agency of Helen Duncan, spirits of deceased persons should appear to be present in such a place as Helen Duncan was then in and that the said spirits were communicating with living persons then present." The case for the prosecution was that the séance was a fraud and that the figures were Mrs. Duncan masquerading in a sheet. The defence was that Mrs. Duncan was a genuine medium and that the séance was free from all fraud. Evidence was given by some of those present in favour of the medium to rebut that of those to the contrary and emphasis was laid on the fact that no sheet was found and the police refused to search those present though asked to so do. A number of witnesses were also called to testify to Mrs. Duncan's powers on other occasions, while the defending Counsel also asked that Mrs. Duncan should be allowed to demonstrate her powers to the court. This was refused first of all by the Recorder without reference to the jury and on a later day again after consulting the jury. During the course of the defence the prosecuting Counsel asked leave to prove a previous conviction under the Vagrancy Act at Edinburgh in 1933. After argument this was allowed on the ground that he was entitled to introduce evidence rebutting that being given to prove she was a genuine medium.

In his summing up to the jury the Recorder said, "If Mrs. Duncan by going into a trance or simulating a trance pretended to hold communion with spirits that is the kind of conjuration referred to in the Statute." Later on in a different context he said, "The emphasis is on the word 'pretend'." The offence, if there was an offence, began as soon as it was claimed to do that kind of thing.

This part of the charge is of great importance. The Recorder did not tell the jury that if they believed Mrs. Duncan was a genuine medium and

that if they found that spirits really did appear they should acquit her. On the contrary, he said it was an offence to claim to be able to communicate with spirits. He did, however, say that the defence was entitled to the benefit of the fact that no sheet was found. How this could benefit her in the circumstances was not explained. He also said the case was not an attack against Spiritualism. In the court after an absence of twenty-five minutes the jury found all the defendants guilty. Mrs. Duncan was sentenced to nine months' imprisonment, Mrs. Brown to four months, and the other two were bound over.

The Recorder refused a certificate of leave to appeal. Sentence was passed on 3rd April, bail being refused pending appeal. The Appellate Court could not sit to hear the application for leave to appeal, which in fact became the appeal, till 8th June. The main point of law argued was that the word conjuration only meant the summoning up of evil spirits and that to hold or pretend to hold converse with good spirits was no offence. This point was decided against the appellants and the appeal failed. The Attorney-General refused to grant a fiat for appeal to the House of Lords on the ground that the case was not a matter of public importance.

The main points of interest in the judgment of the Lord Chief Justice who sat with Oliver and Birkett, JJ., were the following:—

(1) "To examine what took place on other occasions scarcely seems relevant to the charge." Had this evidence been excluded "we do not think complaint could properly have been made. Indeed, we think it would have been rightly excluded."

(2) "We think the learned Recorder exercised his discretion wisely" in refusing, after referring to the jury, to allow a demonstration to be given by Mrs. Duncan.

(3) "It was repeatedly emphasised at the trial by the learned Recorder and must be emphasised here again, that the only matter to be decided was whether there was a pretence or not. The prosecution did not seek to prove that spirits of deceased persons could not be called forth or materialised or embodied in a particular form."

"Their task was more limited and precise: it was to prove, if they could, that the defendents had been guilty of conspiring to pretend that they could do these things and therefore of conspiring to pretend that they could exercise a kind of conjuration to do these things. That was the case made by the prosecution to the jury."

When one examines the terms of the Recorder's charge to the jury and these passages from the Chief Justice's judgment, one naturally asks what was the defence which a medium claiming, or on whose behalf it was claimed, that spirits materialised in her presence, could make to a charge under the act in respect of a particular séance. If she could prove that spirits were actually materialised at that séance would it be a good defence or not? In view of the declared objects of act and the Recorder's exposition of the law, which was upheld by the Appellate Court, it would seem that to try to prove the séance was genuine would only make matters worse. It would establish that she was trying to do "or pretending to do" what the act in effect pronounces to be impossible and could only make her conviction more certain.

However, given that to establish that it was a genuine séance was a good defence, how was this to be done? The general opinion, based on the attitude of science, religion and perhaps common sense, is that such things are impossible. An attempt to convince a sceptical jury and

Recorder by evidence as to what happened at the particular séance was bound to fail. It would be necessary to take notice of the recorded opinions of distinguished investigators such as Sir William Crookes and Sir Oliver Lodge and to produce evidence to show that Mrs. Duncan was a genuine medium. Above all, a demonstration of her powers to the jury would be the supreme test. But all these courses were pronounced by the Chief Justice to be inadmissible. Whichever view is taken, therefore, the accused had no real defence to the charge against them. It is clear that anyone who sits in future as a physical medium is liable to be charged and convicted under the act.

A few months later a trance medium was convicted under the same act for pretended conjuration and it was pointed out by Henry Elam, the junior Counsel appearing in the Duncan case, who represented the Director of Public Prosecutions before the magistrate in this case, that the Court of Appeal had held that pretence of communication with any spirit, good or evil, was illegal. In this case the medium was not a physical medium: that is, no forms purporting to be spirits appeared, the medium merely went into a trance and while in trance gave messages from deceased persons or spoke as though controlled or possessed by a deceased person. The present position, therefore, seems to be that any medium who sits for the purposes of communication with deceased persons is guilty of an offence under the act and liable to a year's imprisonment on conviction. Yet it was stated in both cases in court that no attack on Spiritualism was being made.

However, the not unnatural result of these cases appears to be that in some places at any rate, the police regard the mere exercise of mediumship as illegal and take steps to prevent it. Last autumn they interfered to prevent a public meeting at Altrincham, at which a demonstration of clairvoyance was to be given, and early this year at Redhill in Surrey they visited a Mrs. Johnson, a diploma-holder of the Greater World Spiritualist League, who conducts a church there, according to affidavits filed by herself and her husband, informed her that the giving of trance addresses, clairvoyance and the like was illegal and induced her to sign an undertaking to refrain from using her own gifts or employing other mediums at her church in future, in order to avoid a prosecution. She has since been refused a copy of this document.

(2) *The Vagrancy Act*, 1824, 5 *Geo. IV Cap.* 83.

Even before recourse was had to the provisions of the act of 1735, the position of mediums under the law was far from satisfactory. Every medium was in danger of prosecution under the Vagrancy Act, if she accepted fees, and the police could be compelled to take action by a common informer. Information laid by such an informer was followed by police, usually police women, applying to the medium under a false name for a sitting which if granted they attended in disguise and attempted to induce the medium to make some prediction about the future. It was usually vain for the medium to deny she had done so, as the magistrate almost invariably accepted the police evidence and convicted the accused.

The Vagrancy Act has other unpleasant features besides the above. It is described as an Act for the punishment of idle and disorderly persons and rogues and vagabonds. Sections three and four detail a long catalogue of offenders, all of whom are to be deemed rogues and vagabonds. These include persons exposing their persons in public, male persons who live

on the proceeds of prostitution, reputed thieves, fraudulent beggars, persons with housebreaking instruments, pistols or other weapons in their possession and so forth. Among others are persons pretending or professing to tell fortunes. To charge respectable men and women, many of whom are in effect ministers of religion under an act of this kind seems most undesirable as well as unnecessary. Persons so accused can be and often are, as Mrs. Duncan was, arrested without warrant and refused bail—a quite unnecessary feature of prosecutions of this kind. Finally, the maximum penalty is three months' imprisonment and this precludes trial by jury or appeal, except to quarter sessions, where an appeal can be dismissed without reason given.

(3) *Conclusions*

It is sometimes estimated that there are about a million Spiritualists in the country. The exact number is unknown: at any rate they are very numerous. Most of them claim that Spiritualism is their religion: others merely consider that proof of survival establishes the claims of Christianity and other religions. Now by the invocation of an obsolete statute which was framed with entirely different ideas the practice of mediumship has in effect been made illegal and here and there the police consider it their duty to try and put a stop to it.

It is difficult to see why under modern conditions persons who wish to sit with a medium should not be allowed to do so. If they think they are deceived, that seems their own risk. As the Chief Justice pointed out in his judgment, the foundation of all these laws was the idea that communication with spirits was an offence against God and religion. We are free to think differently now and the act is really an archaic survival. Fortune-tellers appear to be free to practise openly in London, employing sandwich-men to advertise themselves in Oxford Street and Regent Street. Yet the police take no action against them. Why should they employ the hateful *agent provocateur* against mediums?

The only satisfactory course seems to be to repeal both these ancient acts or such parts of them as can be used against mediums. A prosecution for obtaining money under false pretences will still always be possible under the Larceny Act.

B. Abdy Collins

Liability of Local Authorities for Defective Air-raid Shelter

The case of *Baker* v. *Mayor* of *Bethnal Green*, now decided by the Court of Appeal, [1945] 1 AllE.R. 135, has aroused considerable public attention, more, however, because of the disaster from which it arose than because of its legal problems. By far the greater part of the judgment, which Lord Greene, M.R., delivered for the court, was taken up by the question whether the local authority had been guilty of negligence as regards the condition of the air-raid shelter. This question was answered in the affirmative. The steps were defective, faintly illuminated and without a handrail in the centre. No warden was posted at the danger point so as to be able to control the crowd. There had been previous complaints as to the condition of the steps. The defendants were aware that, in the case of an alert, there was a strong probability of a large rush of people which in the absence of control would be dangerous.

The only legal problem arising was that of the position of the occupants

of the air-raid shelter in regard to the Borough Council. This is another case of a relation arising from the exercise of a public duty. In *Ellis* v. *Fulham Borough Council*, 1938 1 K.B. 212, visitors of a public recreation park were held to be licensees by the majority but invitees by Greer, L.J. In the present case the court did not think it necessary to express an opinion on the question, but assuming that the visitors to the air-raid shelter were only licensees, held that the Borough Council was liable. According to the now universally accepted view, liability to a licensee is confined to cases where the licensor knows of a danger which is not apparent or would not reasonably be apparent to the licensees. In Ellis' case, where a child was injured by treading on broken glass in a paddling pool, this was stretched very far, as it was held that the knowledge, on behalf of the authority, not of the existence of broken glass, but of the danger of there being such broken glass was sufficient knowledge. This, as pointed out elsewhere,[1] " was nothing but a roundabout way of saying that the council should have been aware of the presence of the glass which caused the injury . . . Thus the distinction between knowledge and the means of knowledge loses its meaning and with it the distinction between liability towards invitees and licensees." Counsel put forward a similar argument in the present case, but Lord Greene did not think it necessary to consider whether this view was correct or not and dealt with the matter "on the hypothesis that in order to fix a licensor with liability, it is necessary to bring home to him not merely knowledge of the facts which constitute the danger, but his own knowledge that those facts do constitute a danger." On that hypothesis, the court found that the defendant council had such knowledge and was therefore liable. W. FRIEDMANN

The Nature of a Profession

The term "profession" is yet another of those expressions—such as "trade," "residence," etc.—which have proved to be so difficult of a clear judicial interpretation with the result that the decision whether or not a profession is being exercised has been held essentially to be a question for the appropriate fact-finding body, such as the General or Special Commissioners of Income Tax. This is not unnatural where a statute uses ordinary non-technical language to describe a person in such broad terms that it becomes a matter of general impression whether or not the person falls within the given statutory expression.

Where the profits of a profession are wholly or mainly dependent on the personal qualifications of the person who is carrying on the profession, they are excluded from liability to the current Excess Profits Tax—Sect. 12 (1) Finance (No. 2) Act, 1939—in the same way as similar profits were exempted from the Excess Profits Duty imposed during the first German war, see Sect. 39(*c*) Finance (No. 2) Act, 1915. An examination of the cases decided under the 1915 Act, shows how impossible the Courts found it to lay down any juridical definition of the term "profession" having regard to the infinite varieties of businesses that can be carried on. The Courts held that—apart from those clear instances where no reasonable man could doubt that a profession was or was not being exercised—it was essentially a question of *degree*, of evidence both ways and of impression, whether the taxpayer could be said to carry on a profession; since a question of degree is always a question of *fact*—*Inland Revenue* v.

[1] 21 *Canadian Bar Rev.*, p. 84.

Lysaght, [1928] A.C. 234—the High Court was without jurisdiction to review the decisions of the Appeal Commissioners on the issue "profession or not" as no error of law could be pointed to, see Sect. 149 (1-*a*) Income Tax Act, 1918.

In *Inland Revenue* v. *Maxse*, [1919] 1 K.B. 647, Scrutton, L.J. attempted a definition of the term "profession" suggesting that its essence involved the idea of an occupation requiring purely intellectual skill or, where manual skill was necessary as in the case of a painter or surgeon, that this should be controlled by the intellectual skill of the operator; this definition was, however, considered by the Court of Appeal in *Carr's* case, *infra*, to be too sweeping. It can, though, be deduced from the cases that it is essential the *de cujus* should be a member of an organised body of persons with a recognised standard of ability and a code of conduct. As times change so does the line of demarcation between a "trade" and a "profession"; formerly the term "profession" was confined to the so-called learned professions—The Church, Law and Medicine—but this distinction has long been out of date; for example, before the end of the nineteenth century, the practice of a chartered accountant was universally regarded as professional in the fullest sense of that term and, since then, many other avocations have come to be generally regarded as professions.

The findings of the Appeal Commissioners, in each of the following cases, that a profession was *not* being exercised were upheld in the Courts viz., *Hugh Cecil* v. *Inland Revenue* (1919), 36 T.L.R. 164, as regards a high class photographic artist, *Barber & Sons* v. *Inland Revenue* (1919), 35 T.L.R. as respects a stockbroker, *Durant* v. *Inland Revenue*, [1921] 2 K.B. 332, in regard to an insurance broker and *Currie* v. *Inland Revenue* (1921), 37 T.L.R. 371, as to a taxation expert who was not a member of any recognised accountancy body. In *Inland Revenue* v. *North & Ingram*, [1918] 2 K.B. 705, a finding that a qualified schoolmaster who ran a preparatory school was exercising a profession was upheld; similarly in *Inland Revenue* v. *Maxse*, [1919] 1 K.B. 647, a finding that a journalist, as opposed to a reporter, was carrying on a profession was approved.

Two recent cases—*Webster* v. *Inland Revenue*, [1942] 2 All E.R. 517 and *Inland Revenue* v. *Carr*, [1944] 2 All E.R. 163—decided under the Finance (No. 2) Act, 1939—have more than emphasised that the question whether an *individual* is exercising a profession is essentially one of degree, and therefore of fact, solely for the Appeal Commissioners provided there was some evidence to justify their conclusion. It might be noted, in passing, that where a *limited company* employs professional men to do professional work, e.g., naval architecture, it is carrying on a trade and not a profession, *Wm. Esplen & Son & Swainston, Ltd.* v. *Inland Revenue*, [1919] 2 K.B. 731. In *Carr's* case the appellant was an ophthalmic optician, that is he tested eyesight and prescribed spectacles which he ordered from spectacle makers, making an inclusive charge for testing and supply; a finding that this was not a profession was upheld. In *Webster's* case another body of Appeal Commissioners held that the appellant, *also* an ophthalmic optician, was exercising a profession! Each appellant was a member of an organised body—the Joint Council of Qualified Opticians. The apparent inconsistency in these decisions is resolved when we appreciate that in each case the Court held that there was evidence to justify the Commissioners' finding though it was stated that, if the findings had been the other way, they would equally not have been disturbed. Probably *Webster's* case was so decided by the Appeal Commissioners because the appellant advertised neither

in the press nor on his premises, while his training and experience had been somewhat exceptional. In the latter case the Court of Appeal emphasised that its decision did not imply that *all* ophthalmic opticians were exercising a profession but merely that this particular optician could—on the special facts of his case—reasonably be held to be so doing.

Two interesting cases arising under the Income Tax Acts should be noted on this question; in each case the decision of the Appeal Commissioners was reversed because they had misdirected themselves in law. In *Davies* v. *Braithwaite*, [1931] 2 K.B. 628, it was held that an actress exercised a profession and not an employment since her mode of livelihood contemplated the making of a series of successive engagements or contracts. *Seldon* v. *Croom-Johnson*, [1932] 1 K.B. 759, emphasises that throughout his career a barrister carries on the same profession, that of a "practising barrister," with the result that, on appointment as King's Counsel, he cannot be said to have ceased to carry on his former profession of "barrister" and to have set up a new one of "King's Counsel," though, of course the work he was engaged on might be very different.

A. FARNSWORTH

REVIEWS

PATENT REFORM. By MICHAEL POLANYI, F.R.S. The Students Bookshop, Trumpington Street, Cambridge. **2s. 6d.**

Inventions have played an outstanding part in the development of our industrial civilisation. It has been said that the face of life has changed more during the last century than during the whole of the rest of history, a change due almost entirely to mechanical inventions. The rewarding of inventors is evidently, therefore, a very important matter, and thought commensurate with its importance has never been given to it.

The method of rewarding inventors which has normally been followed is that of the conferment upon the inventor of monopoly rights to the use of the invention. Since the Statute of Monopolies in 1623, "established the basis of all modern patent law" it has been the practise to limit the period of such monopolies to fairly short periods, such as the one of fourteen years established by that act and now extended to sixteen years.

This statute has "sustained no alteration in principle during the intervening three hundred years," and it is a remarkable and up to a point a creditable fact that state authorities and law courts should have been able to administer this rather primitive conception of the way to award inventors so as to build up a body of law which still functions more or less adequately in the vastly changed conditions of twentieth-century industry.

Divergencies there have been in the development of the law, and these are considered by some historians[1] to have materially affected the output of inventions: as in the U.S.A. during the nineteenth century, where the law relating to the improvement of inventions is said to have been particularly favourable.

There has, however, for many years now been a considerable and growing body of thoughtful opinion which finds the present system quite inadequate to the changed character of industry and of invention. The

[1] *Cf.* J. G. Crowther: *Great American Scientists, Vol. II.* Penguin Series.

procedure in connection with the award of patents has become so cumbrous, expensive, and what is worse than all, hit or miss[2] that even the most conservative are beginning to feel uneasy about it, and the Government last year appointed a strong Departmental Committee to consider the need for changes both in the existing law and in the practise of the Patent Office.

There seem to be two schools of thought. Those who consider that the existing law provides an adequate basis on which the needs of the community and the merits of the inventor can be adequately satisfied, provided some adjustments are made in the law, and the practise is simplified and improved, and those who hold that a situation has been reached when an entirely new system is required.

In deciding between them there seem to be two main points for consideration. In the first place the method of invention has changed completely. Important industrial inventions now depend on intensive research carried out by teams of scientists. The process is a gradual one. Rival teams may be working upon the same invention for years, and it may be exceedingly difficult to decide when a point has been reached at which the invention becomes patentable. Moreover, since much of the research is bound to become common knowledge, it may be very largely a matter of luck which team reaches first the stage at which the patent becomes awardable. The difficulties of defining invention so trenchantly discussed by Mr. Potts in the article above referred to derive very largely from this change of method, and his proposals though they would, if adopted, produce an amelioration of the present situation, do not provide a solution, for it would continue to be something of a toss up who would get the patent.

In the second place the provisions of present-day patent law are peculiarly favourable to the working of monopoly capitalism. Many kinds of industry, such as boot and shoe making, glass bottles and containers, chemicals, etc., cannot be carried on unless manufacturers can use the appropriate patents. In the result small groups of capitalists can and do completely dominate some industries: in others power is used more circumspectly. We have only to take the process a step further into the international sphere in order to get a complete stranglehold established, and that this has already taken place in a number of industries is well known.[3]

Present-day patent law is peculiarly open to this form of abuse because the patent is regarded as essentially a type of private property, to be dealt with as such. As Professor Polanyi points out, however, an invention is "in the nature of knowledge" and "the proper way to assure that an invention will be utilised best is to give it full publicity, and allow its free application by everyone." In other words the time has come when the interest of the community must be more directly considered, and when we must no longer be content with the sacred formula that "the best interest of the community is that the rights of property should be upheld."

Most people now agree with the general terms of this argument; and the dispute is rather one of degree than of principle. In the case of patents, however, there is the additional problem, largely a technical one, of how,

[2] See e.g. H. E. Potts, "The Definition of Invention in Patent Law," 7 Mod. L. R., 113.

[3] *Cf. Germany's Master Plan*, by Borkin and Welsh: reviewed 7 Mod. L. R., 249.

while making the invention fully available to manufacturers, to ensure that inventors shall be adequately rewarded: for while some inventors will continue to invent whether rewarded or not, capitalists will not provide the large quantities of capital required for the commercial exploitation of inventions unless they can see their way to the winning of a profit commensurate with the risk involved in the financing of any such idea.

There have been two main proposals for solving the problem. The one an extension of the existing systems of licenses of right, and the other for a new system of direct awards to inventors from the public purse. A patentee can apply under Sect. 27 of the Patents and Designs Act, 1927, to have his patent indorsed "license of right" which means that any person can then make use of the invention on terms to be settled by the Comptroller of Patents, in the absence of agreement between the parties. As Professor Polanyi points out the use made of this system up to the present is negligible, less than a half of one per cent. The incentive of a reduction of fifty per cent in the fees payable which is held out as an inducement can, of course, only affect the needy inventor who has not been able to find a financial backer. Financiers who have provided the substantial sums necessary for turning an idea into an industrial process are obviously not going to consent to the patent eventually secured being marked "licenses of right."

What happens at present, however, is irrelevant to the question of making licenses as of right compulsory, except in so far as it emphasizes the financial side of the matter which under a system of private enterprise is obviously crucial. The great difficulty about the licenses of right system is the fixing of the terms upon which the invention may be used. It must be impossible for the Comptroller in the ordinary case to forecast the success of an invention. As Professor Polanyi points out, he would have to adopt some sort of standard rule, fixed at a fairly low level. But the financing of an invention is inevitably a speculative business, and except in so far as it consists in the building up of elaborate existing processes by the big combines is only undertaken by men who are content to incur great financial outlay in return for the chances of earning very large profits indeed. They will obviously not be prepared to function on the basis of compulsory licenses of right. While it will equally obviously be unfair to the great combines if the work of their expensive research department is to be made available for all on the payment of a standard scale of fees.

While Professor Polanyi may be over pessimistic in his assertion that the proposal "would practically amount to the abolition of patents" it is clearly open to very serious objection, and in its present form at any rate is altogether too naïve to meet the requirements of modern financial and industrial conditions.

The other main proposal is that of direct rewards to inventors paid out of the resources of the state. This method was in fact used in connection with inventions of military weapons, and other articles used in the prosecution of the war of 1914–1918, and will presumably be used again. It seems to be the only practicable way of rewarding inventors in such circumstances. The important point here, however, that the work of the tribunal which had the advantage of the services of Lord Tomlin, a great lawyer with the necessary experience of patent cases, appears to have been done efficiently, successfully, and to the satisfaction, on the whole, of the applicants.

Such an award can, of course, only be made in the light of experience

of the usefulness of an invention, and it suffers from a certain crudeness in the method of monetary assessment, which is on the face of it inevitable though if it were used in connection with commercial as opposed to warlike inventions, experience would inevitably enable this hit or miss character to be largely overcome. Even so, the method has an obvious advantage over the "license of right" where the terms of user have to be fixed at the beginning. On the other hand the inventor is prejudiced by having to wait longer for his money.

Professor Polanyi, a distinguished natural scientist, whose incursions into the domain of practical economics have been most fruitful, now comes forward with proposals which go far to remove the crudities of the direct reward method, and to bridge the difficult transition from the old to the new. His suggestion is in short that patentees should be encouraged to have their patents marked "license of right" by public rewards based on the estimated values created by the inventor. The assessment of such values is obviously the major difficulty in the way of the scheme. Professor Polanyi does not shirk this problem, and while his solution is not in all respects convincing, it provides solid ground for further investigation and discussion. Even if only a very rough approximation of the annual profit accuring to industry from the use of an invention can be made, the inventor who is to receive annually, from the state, not from industry, an award of from one-tenth to one-third of such profit, will clearly have a much more attractive proposition before him than under the present method. In short, Professor Polanyi's proposal seems to combine the advantages of both the method of "licenses of right" and that of rewards by the State.

Professor Polanyi also makes proposals of an important radical character under which the present rigid and technical administration of the patent law by the Courts,[4] would be replaced by a more flexible and equitable administration entrusted to a panel of technical experts and trade representatives who would assess the degrees of invention and novelty possessed by each patent and grade it for purposes of reward. In this way the just claims of inventors would no longer be rejected time after time as pure technicality; men who have done nothing to give a general idea practical industrial shape would no longer be able to scoop the proceeds of other people's hard work, and in cases where the minds of several have contributed to the building up of an invention all would share according to their relative merits in the reward resulting to their good work instead of one lucky member of the group being enabled, as under the present administration, to secure the whole.

Space does not permit longer discussion of this ingenious and fruitful proposal. We can only express the hope that it will receive open-minded discussion and assessment among the lawyers, business men, and civil servants concerned with this so vital problem.

R. S. T. C.

THE OUTLOOK FOR INTERNATIONAL LAW. By J. L. Brierly, Oxford University Press, 1944. Price **6s.** net.

In this simple and lucidly written little book the Chichele Professor of International Law and Diplomacy in the University of Oxford does not attempt to assess, from a legal point of view, the extent of the challenge

[4] We hope to publish an article drawing attention to some of the worst of these rigidities in the next number of the Modern Law Review.

to international law by a world profoundly shaken in its social foundations. It is a collection of short essays addressed to the general student of international affairs rather than to the lawyer, and the essays collected in it attempt to answer the question what international law can or cannot be expected to achieve in the world of to-day. Nor is it a comprehensive treatise on this subject but rather a discussion of certain vital questions.

The basic theme in Professor Brierly's discussion is that you must not expect international law to do too much. He explicitly repudiates the legalistic and formalistic approach of Kelsen which regards law as the foundation of international order and not as "one of the benefits that the organisation will bring in its train." It is certainly wise and timely to stress the limitations of all law, and of international law in particular, which is intimately linked to the political foundations of the society in which it operates; in other words, law does not shape the society but expresses its principles in certain technical forms.

Another vital point by now almost commonplace among students of international affairs, is the insistance that law needs force as its guarantor, that the League Covenant was therefore rightly conceived in principle and that it foundered not so much on its structural or ideological weakness as on the lack of will on behalf on the major powers to make it real.

Professor Brierly rightly insists, however, on the need not to forget the actual institutions of international society which make it work and live, through an exaggerated emphasis on force. In this connection he stresses the essential difference between international law as hitherto developed and the law of the modern state. The former has been in the main a *laisser faire* system, the other a system in which the state regulates a steadily increasing range of human and social relationships. Hence the limitations of international law. It is greatly to be regretted, however, that Professor Brierly has not followed up this most important point by discussing the way in which the increasing control of the state over human relationships reflects on this *laisser faire* system of international law. This is a point of vital significance and almost entirely neglected by international lawyers, despite the acute problems posed by the legal relations between socialist, capitalist and semi-capitalist states.

The author is sceptical about the prospects of making all international disputes subject to jurisdiction. It is certainly true that, as long as the national state persists, it will not submit its most vital political questions to legal settlements. Professor Brierly suggests as the only practicable procedure "in any future with which we need concern ourselves" one in which a third state may be able to influence but not to decide the manner in which a demand for a change in legal rights is to be dealt with. He recommends, though without great enthusiasm, the constitution of some international standing conference, and an obligation on the states to submit their disputes to such a body, not indeed for decision but for consideration.

Professor Brierly disagrees with those who think that international law is not really possible in a world of sovereign states. But the upshot of his lucid and realistic discussion is nevertheless the extreme limitation of international law in such a world. It is certainly wise not to expect much change in the present state of affairs. It may well be that, despite all that has happened, the world will have to go through another phase of intensive nationalism and therefore a period of very lean years for international law. But it is more patent than ever that a plain and inescapable

choice will be between the maintenance of an order of sovereign states grouped around a few super-powers and regarding international institutions largely as a matter of horse dealing, and the development of genuine international services, in the military as well as in the economic and social field. It is a matter of temperament whether one states this issue in the gentle and resigned manner of the author, or in the more challenging and uncompromising form which other but certainly not only starry-eyed idealists prefer. It is encouraging that some distinguished serving officers of senior rank are now taking the lead in this latter approach.

W. FRIEDMANN

THE ELEMENTS OF ROMAN LAW. With a Translation of the Institutes of Justinian. By R. W. LEE, D.C.L., F.B.A. London: Sweet and Maxwell, Ltd., 1944, xxiii and 488 pp. **27s. 6d.**

Professor Lee's new book consists of a brief Introduction, mainly historical, followed by a translation of the Institutes with expository sections interspersed. These sections are both more and less than a commentary, for, though they are fitted to the text, they set out the subject in the manner of a textbook without attempting to comment on individual paragraphs. Text and explanation are liberally cross-referenced—an excellent feature. The text is almost complete and mainly in the original order, but some of it is printed in smaller type than the rest and the author seems to have little hope that students will read it. If this is the only book on Roman law which a student reads, and, as the Preface says, it is likely to be so with many readers, a commentary of the sort described is certainly much more educational than one like Moyle's, and it need hardly be said that the elements of the law are set out in a clear and scholarly manner. The book is in fact an immense improvement on almost all—from some points of view on all—others which a teacher can recommend to first year men. Professor Lee has written the work he intended to write with great success, but he has not written the work the reviewer hoped he would write, and which he would be one of the best qualified in the world to write. He does, it is true, refer to modern codes from time to time, and gives three short appendices on the influence of Roman law on modern systems with respect to Persons, Property and Obligations, but these are "not to furnish precise information so much as to direct attention to some features of the landscape." The reviewer would have liked to see instead a drastic pruning and recasting of the material so as to make it an introduction to Roman law and at the same time an introduction to those ideas and principles which have been fruitful in later ages and still survive in civil law countries or in parts of English law. The reason the author has not taken this line is clear from his Preface. He believes that no one should be credited with a knowledge of Roman law who has not read Justinian's Institutes, and that if students cannot or will not read the original they may be induced to read a translation. But is there really much to be got from reading a translation of the Institutes, it being fairly clear that if one reads them in a translation one will not read any other Latin book in the original, and probably no other Latin book at all? When law students had for the most part learnt a fair amount of Latin it was possible to ask them to read the text carefully and even to compare it with that of Gaius, which was an educative practice both for exactitude of method and for inculcating the principles of growth and decay in legal history. It also

enabled an intelligent reader to appreciate the very curious nature of the Institutes as lecture notes and statute combined, and to some extent the hybrid method of Justinian's codification as a whole. It is very difficult to read a translation with the same amount of attention, and the text will almost inevitably be treated as an accessory to Professor Lee's exposition, whatever his own intention may be in the matter. Few students will understand the significance in legal history of the discussion of quasi-contract and quasi-delict in Justinian without being confronted with the absence of anything similar in Gaius, and the author can only spare about half a page to explain the matter. Servitudes are in a similar position, and in the law of intestate succession a good deal is left almost without comment for the obvious reason that to explain the difficulties would require far more space than the general scope of the book justifies. In fact, this is where the reviewer differs most from Professor Lee. By setting himself the task of explaining most of the Institutes he has not left himself enough room for matters which the elementary student finds difficult and which, if understood, would really help him. *Justa causa*, for instance, in usucapion gets only a short paragraph, and the very difficult concepts of formal and causal contracts are compressed into just under a page. *Culpa* too, for most students, needs more than two pages of explanation, and here the author has, presumably by an oversight, allowed himself to use the expression *vis maior* without saying what it means. Such criticism, no doubt, seems ungrateful, but *le mieux est l'ennemi du bien*. One would have been very glad indeed to have Lee on Roman Law thirty years ago when there was nothing between the ponderous commentary of Moyle and the somewhat meretricious attractions of Sohm, but now, if Roman law is to retain a valuable place in elementary legal education it should learn to adapt itself to an age in which the classical form is a hindrance rather than a help. We cannot call back the classics as a common basis of education, but what we can hope to do is to give some educative legal history and a logical skeleton much more easily discernible than that of modern, especially Common Law, systems, and we can lay the foundations for comparative jurisprudence.

H. F. Jolowicz

NATIONAL HEALTH INSURANCE. By Hermann Levy (published by Oxford University Press)

Professor Hermann Levy's study of National Health Insurance was, as he states, finished by the end of 1942. Owing to the difficulty of wartime publication it was not in print until the end of 1944. This is particularly unfortunate as in the interval there appeared not only the Beveridge Report, but also the White Papers containing the Government's Social Insurance scheme, and the Plan for a National Health Service, and the Disabled Persons (Employment) Act was passed into law. Professor Levy deals briefly with the Beveridge proposals in a Postscript, but is unable to notice the Government schemes or the Rehabilitation Act at all. This is a great pity, because a considerable part of the reforms which he advocates is now accepted by the Government in principle, and, as far as rehabilitation is concerned, is actually beginning to be put into practice. It is true that the Government Insurance scheme proposes a different basis from that which Professor Levy thinks desirable, but many of the reforms contained therein are similar to those which he suggests.

The value of the book is inevitably reduced by the fact that the system

which it so admirably describes is unlikely to last in its present form very much longer. Nevertheless it should be read with deep interest by all students of social legislation and by social workers, for it is the most complete and critical analysis of National Health Insurance which has yet appeared. It treats in detail the origin and scope of the scheme, discusses at length the various forms of benefit, the panel system and the Approved Societies and the whole administration, makes certain comparisons with Insurance schemes in other countries, and concludes by making suggestions for reform.

The defects and inadequacies of the present scheme are, in Professor Levy's view, chiefly due to the adoption of the Approved Societies as agents for paying benefits. These Societies, he contends, are competitive in character, have no territorial basis but draw members from all districts and have high administrative costs. Further the connection of many of them with industrial assurance is a great disadvantage, as in these cases National Health work may be looked upon as a means for securing more profitable business instead of as a social service. This expensive competition with no real democratic control results in an inadequate amount of general benefit, and an indefensible and illogical variety of additional benefits.

The author is also critical of the present scheme of medical benefit. The panel system as worked now is unsatisfactory, for the doctors are inadequately paid and do not in all cases render satisfactory service, and the principle of free choice of doctor upon which so much stress is laid is more apparent than real, owing to the difficulties which are encountered if an insured person wants to change his doctor. The range of medical benefit also is far too limited as specialist, nursing, hospital and rehabilitation services are all outside its scope; for these reliance has to be placed on such institutions as voluntary hospitals, District Nursing Associations and charitable or semi-charitable agencies.

Few people who have had much to do with the National Health Insurance system as it affects particularly the poorer sections of the population will disagree with most of these criticisms. One more might be added, which Professor Levy mentions but does not stress, namely the extremely unsatisfactory provisions with regard to maternity benefit; only an inadequate lump sum is provided at present—no weekly allowance and no medical treatment form part of the benefit.

In the discussion of reforms, the misfortune of the inevitable delay between writing and publication become evident. The lack of a rehabilitation scheme will certainly be remedied at least in theory by the Disabled Persons (Employment) Act, which seems likely to work out satisfactorily in practice. Other defects in medical benefit will also be dealt with if the Government's plan for a national health service comes into being—at least the principle is accepted. Professor Levy would prefer a reformed panel system to a State Medical Service; the latter in his view involves fundamental changes the consequences of which are difficult to foresee, while the former being part of the insurance plan would work on a system of assessable risks. He does not, however, discuss this matter fully—inevitably, as he wrote before the Government plan was available.

His scheme for the reform of the system as a whole would entail territorial or occupational associations, involving the abolition of the Approved Societies, with their competitive methods and high administrative costs. Benefits and contributions should be related to earnings and

not at a flat rate. Sickness insurance would remain on an employment basis as now. Such a system he contends worked very successfully in certain continental countries before the war, particularly in the case of pre-Nazi Germany. But it would inevitably leave outside large sections of the community even if dependants' allowances were included.

Professor Levy seems to dismiss too easily a scheme of all-in insurance on a citizenship basis, with one central co-ordinating authority as proposed by the Beveridge Report and the Government White Paper. He does not refer at all to the New Zealand scheme which works successfully on this principle nor to other national proposals on the same lines.

But although the proposals for a reformed system will probably meet with a good deal of disagreement, and must inevitably have a rather unreal air in view of later official pronouncements, the book as a whole is both interesting and valuable.

R. C. CHAMBERS

WORLD PENAL SYSTEMS. By NEGLEY K. TEETERS, pp. x, and 220: 1944, Philadelphia, by the Pennsylvania Prison Society. **$2.00.**

Pennsylvania has from early times, in the history of the U.S.A., been a centre of penological thought and work; indeed in the world at large, for the Pennsylvania System of separate detention of prisoners was a landmark in prison discipline which the criticism since directed against it has unduly obscured: certainly it was more studied and copied by other countries than has been any other criminological method. It is in the tradition of Pennsylvania's enlightenment, therefore, that the local Prison Society should have sponsored this survey, and have obtained for its compilation the services of Professor Teeters, one of the foremost contemporary criminologists. In doing so they have rendered a valuable service to all those who without being professional students of criminology have an informed interest in the subject, and do so much to create that "mood and temper" in the general public "with regard to the treatment of of crime and criminals" which in the words of Mr. Winston Churchill, when Home Secretary, "is one of the most unfailing tests of the civilization of any country."

Professor Teeters has set out to give a series of short historical surveys of prison methods and theories in all civilised countries. In doing so he has naturally had to concentrate upon the most noteworthy features, a task which is notoriously more difficult than that of elaborate description. As far as I am able to judge he has succeeded admirably in his work. There are no doubt numerous gaps which others would not have left, and emphasis in places which others would not have stressed, but the general impression is one of balance and fairness of judgment.

As Dr. Hermann Mannheim emphasizes in his Introduction, international studies in criminology are of great practical significance. The subject can properly be regarded as among the social sciences, and being of comparatively recent origin, has not on the whole got itself involved either in the static framework or in the ideological tangle, which tend to prevent progress, and to clutter up the jurisprudence, in national systems of criminal law.[1] The result has been a most valuable interchange of ideas

[1] The fiasco of the Eleventh International Congress at Berlin in 1935, where National Socialist penology emerged in full dress, and some of the Communist propaganda about Soviet methods, strike a warning note that science may be giving way to ideology in this as in other branches of social activity.

and methods between the countries of the world. We have already recalled how the Pennsylvania System influenced prison methods in the nineteenth century. Similarly the English Borstal system was built up out of an idea obtained from the U.S.A. Again prison reform generally was much stimulated and influenced by the work of John Howard who in turn was much affected by what he saw in such countries as Holland and Belgium. While on the general theories of criminology the profoundest influence has been cast by the Italian thinkers, Beccaria and Lombroso.

One could extend the catalogue. The point which I wish to make, however, is that the amount of valuable experimental work which emerges from the pages of Professor Teeters' volume provides material for a generation of reforms. It shows too that almost every part of the world has at one time or another made its contribution to progress in this sphere of penology.

It is naturally impossible in the short space at one's disposal to indicate even the main points which are brought out by this book which is itself a summary of main points. One is glad to notice, however, that from the days of Howard our own country is held to have taken a leading part in progressive development, and that our Borstal system particularly strikes the attention of a foreign observer. Where Professor Teeters finds us particularly backward is in the development of psychological treatment, and in our failure to pull down our gloomy antiquated prison buildings.

Among our Dominions, Australia receives particular commendation. It was the first country in the world to develop special children's courts, afterwards taken up particularly in the U.S.A. Classification of prisoners is well developed here—despite the small prison population—and much attention is paid to the intelligence factor in criminality. Canada has experimented courageously with conditional release, and to New Zealand belongs the credit of having invented probation.

Belgium has an honourable record in penology, and the famous colony for vagrants and beggars at Merxplas has been much written about. France was a pioneer in the treatment of delinquent children, but her recent record has redounded less to her credit. Italy is the classic home of criminology and Professor Teeters here strays a little away from his subject to discuss the theories of Beccaria, Lombroso, and Ferri. The most interesting contribution made to penological method of recent times in Italy has been the "Surveillance judge," who is a sort of visiting inspector, but has the authority of a member of the judiciary. Effectively worked, this should be a useful system, but it does not in fact appear to have been of much value: perhaps because of the general decline of standards in Fascist Italy.

The Scandinavian countries are among the most enlightened in the world. More importance is attached to individuals than to buildings and material conditions. Attention is focused on the need for a well trained prison staff with a high moral outlook, and upon the re-education and reform of prisoners. John Howard paid a tribute to the prisons which he visited in Holland, and the Dutch appear to have kept abreast of the times, paying particular attention perhaps to training their prisoners in useful trades which they can pursue on discharge.

In pre-Nazi Germany, much thought was given to the problems of penology, and useful experimental work was done in various directions, especially on the medical and educational sides. In particular in Prussia the task of sentencing prisoners was taken out of the hands of the judges and entrusted to sentencing boards—"the prisoner was considered as an

individual, and throughout the penal process was given individual attention."

In Switzerland great importance is attached to building up the self-respect of prisoners by the provision of useful work for which wages are paid. Many prisoners are employed in agriculture and reclamation of land, a form of treatment which Professor Teeters considers will be "gradually extended as time goes on."

The Russian experiment in penal reform carried on at Bolshevo has been much publicised, and properly so. An industrial or agricultural colony in which the prisoners carry on a civilian occupation in reasonable surroundings, living a normal domestic life, will undoubtedly provide the usual treatment for a large proportion of criminals in the future. It would appear, however, that the Russians have themselves found that a proportion of prisoners require a severer discipline and it seems that a considerable tightening up has taken place of recent years. As is so often the case with Russia, however, the whole subject is so wrapped up in propaganda that it is not easy to get a clear picture of the position.

Japan presents a curious mixture of mediaevalism and modern methods borrowed from the west; the latter sometimes applied in an unintelligent way, as in an over elaborate system of classifying prisoners. Nevertheless great progress has undoubtedly been made in a very important direction —the training of prison officers, in which matter "she has set an example to the entire world."

From South America, too, useful lessons are to be learned. Argentina has abolished corporal as well as capital punishment, and makes an effort to keep prisoners usefully employed. Conditional release is used, and arrangements are being made to bring into effect a system of suspended sentence. Chili and Peru both have modern penal codes drawn up in the light of a forward looking penal philosophy. A Latin American country further north, Mexico, has made striking innovations of recent years, notably the widely advertised conjugal visits which are permitted weekly. As Professor Teeters says "sex in prison is one of our most serious problems, one that is untouched, and, in fact, almost unmentioned." There is no doubt that the enforced abstinence from normal sexual relations which results from normal prison life leads to homosexuality, and other perversions which may become lasting habits. In the absence of family life as permitted at Bolshevo, the Mexican idea should do much to overcome this difficulty. The keynote to the up-to-date Mexican penal code of 1937, is "the rehabilitation of each individual through systems of normal work." An interesting feature, and a sensible one, is that by which the offender has to repay, as far as may be, the damage which he has done by his crime. The blot on Mexican penology appears to be in the treatment of juvenile delinquents which has not been brought into conformity with modern ideas.

Professor Teeters concludes with a short survey of penology in the U.S.A. Progress has been astonishingly uneven owing to the varying standards existing from state to state. More has been written and more experiments have been made during the past few generations than elsewhere in the world, and the U.S.A. now bears an honoured name in the history of criminology. This is by no means always reflected in existing conditions in individual states. By and large the salient features of modern penology in the U.S.A. are the attention paid to juvenile delinquency, the rapid advance made by psychological diagnosis and treatment,

the use of release on parole and of commutation of sentence, and the extent of the provision for after care. When the whole of the U.S.A. comes up to the standard of the best a great work will have been accomplished.

R. S. T. C.

LEARNING THE LAW. By GLANVILLE L. WILLIAMS, 1945. London: Stevens & Sons, Ltd. vii and 156 pp. **7s. 6d.** net.

Dr. Glanville Williams has rendered a signal service to introductory legal studies by bringing together within the compass of a comparatively small readable volume a mass of knowledge which a student has in the past acquired generally as the result of a good deal of labour and much waste of time. The book is written primarily for University and Bar students; but it will be received with even greater welcome by that large band of students who work on their own for many and divers legal examinations.

The first two chapters deal respectively with the Divisions of the Law and Common Law and Equity. The former chapter is extremely well-written and makes a most appropriate introduction; but parts of the second chapter are not perhaps so good: for example, the description of Equity on page 17 seems vague and unconvincing. The third chapter on the mechanism of scholarship is excellent in every way; but it is to be noted that although the Author draws attention to differences in the authority of the older reports, he abstains from any comment on the authoritativeness of current reports. Chapter IV, on Methods of Study, gives reliable hints on a subject about which there can be many differences of opinion; and chapter V discusses technical terms, pronunciation and abbreviations. The sixth chapter deals with Case Law Technique, a subject which could have been made less hard for a beginner to follow. The three chapters on Working out Problems, Answering Book-work Questions, and In the Examination Room, contain sound instruction on examination technique: these chapters will be particularly helpful to students preparing for examinations on their own. Chapter X gives hints on the conduct of Moots and Trials and emphasizes their importance in the training of young barristers. In Chapter XI the advanced student will get general ideas on the best method of approach to his first piece of research. The last chapter deals with careers open to those with legal qualifications.

No student ought to embark on legal studies without reading and re-reading the contents of this book.

D. HUGHES PARRY